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SELECTED CASES

ON THE

LAW OF CONTRACTS

BY

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THIRD EDITION REVISED AND ENLARGED

BY

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PREFACE TO THE THIRD EDITION.

In the present, third, edition of this collection of cases, the work has been entirely revised, and amplified by additional cases and many new annotations. The purpose of the book is to furnish a compact and, at the same time, comprehensive selection of authoritative material for the study and discussion of the principles of the law of contract. The work is now designed primarily to be used alone as the basis of instruction, although it may also be used conveniently with lectures or a standard treatise.

The arrangement of topics follows that of Sir William Anson in his Principles of the English Law of Contracts, whose general plan has served as a model for some other treatises on the subject. This case book, however, covers some topics not dealt with in his book; and some that are treated there are not included here. Two chapters appearing in the former editions of this book, namely, Capacity of Parties, and Impairing the Obligation of Contract, are omitted in this edition, as these are topics which are commonly discussed in the courses on Persons and Constitutional Law in the usual law school curriculum.

In many of the cases the statement of facts has, for the sake of brevity, been either re-written or abridged, without calling special attention to the matter. For the same reason, the practice, now common, of omitting unnecessary portions of the opinions, has been followed; but such omissions are always indicated. In this as in the preceding editions, the principal text consists of American cases, although English cases are represented in the notes and in the discussions in the opinions.

A new feature and one that, it is hoped, may prove of value, is the reference note appended to substantially every case. This note refers the student: (1) to the notes in the Cyclopedia of Law and Procedure where there will be found copious citations of cases, ar-

ranged alphabetically by States, thus making readily accessible to the student a list of cases from his own jurisdiction upon the points of the principal case; (2) to Professor Williston's valuable notes to Wald's edition of Sir Frederick Pollock's Principles of Contract, Professor Williston's citations being likewise arranged alphabetically by States; (3) to exhaustive subject notes in the Lawyers' Reports Annotated; (4) to critical comment and to leading articles in various legal periodicals in which the doctrine of the principal case is discussed or involved.

E. H. W.

COLLEGE OF LAW, CORNELL UNIVERSITY,
September, 1913.

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EXPLANATORY NOTE

In the reference note appended to the cases, the following abbreviations are used: Cyc. (Cyclopedia of Law and Procedure); L. R. A. (Lawyers' Reports Annotated); W. P. (Pollock's Principles of Contract, 3d American Ed. by Wald and Williston); H. L. R. (Harvard Law Review); C. L. R. (Columbia Law Review); Mich. L. R. (Michigan Law Review). The references to Cyc. and W. P. are by page and note number, the latter number being in parenthesis.

PART I.

THE FORMATION OF THE CONTRACT.

CHAPTER I.

Offer and Acceptance.

Every contract springs from the acceptance of an offer.

WHITE *v.* CORLIES.

46 NEW YORK, 467.— 1871.

Appeal from judgment of the General Term of the first judicial district, affirming a judgment entered upon a verdict for plaintiff.

The action was for an alleged breach of contract. The plaintiff was a builder. The defendants were merchants. In September, 1865, the defendants furnished the plaintiff with specifications for fitting up a suit of offices at 57 Broadway, and requested him to make an estimate of the cost of doing the work. On September twenty-eighth the plaintiff left his estimate with the defendants, and they were to consider upon it, and inform the plaintiff of their conclusions. On the same day the defendants made a change in their specifications and sent a copy of the same, so changed, to the plaintiff for his assent under his estimate, which he assented to by signing the same and returning it to the defendants. On the day following, the defendants' book-keeper wrote the plaintiff the following note:

"New York, *September 29th.*

"*Upon an agreement* to finish the fitting up of offices 57 Broadway in two weeks from date, you can begin at once.

"The writer will call again, probably between five and six this P. M.

"W. H. R.,

"For J. W. Corlies & Co., 32 Dey street."

No reply to this note was ever made by the plaintiff; and on the next day the same was countermanded by a second note from the defendants.

Immediately on receipt of the note of September twenty-ninth, and before the countermand was forwarded, the plaintiff commenced a

performance by the purchase of lumber and beginning work thereon. And after receiving the countermand, the plaintiff brought this action for damages for a breach of contract.

The court charged the jury as follows: "From the contents of this note which the plaintiff received, was it his duty to go down to Dey street (meaning to give notice of assent) before commencing the work? In my opinion it was not. He had a right to act upon this note and commence the job, *and that was a binding contract between the parties.*" To this defendants excepted.

FOLGER, J. We do not think that the jury found, or that the testimony shows, that there was any agreement between the parties, before the written communication of the defendants of September thirtieth was received by the plaintiff. This note did not make an agreement. It was a proposition, and must have been accepted by the plaintiff before either party was bound, in contract, to the other. The only overt action which is claimed by the plaintiff as indicating on his part an acceptance of the offer, was the purchase of the stuff necessary for the work, and commencing work, as we understand the testimony, upon that stuff.

We understand the rule to be, that where an offer is made by one party to another when they are not together, the acceptance of it by that other must be manifested by some appropriate act. It does not need that the acceptance shall come to the knowledge of the one making the offer before he shall be bound. But though the manifestation need not be brought to his knowledge before he becomes bound, he is not bound, if that manifestation is not put in a proper way to be in the usual course of events, in some reasonable time communicated to him. Thus a letter received by mail containing a proposal, may be answered by letter by mail, containing the acceptance. And in general, as soon as the answering letter is mailed, the contract is concluded. Though one party does not know of the acceptance, the manifestation thereof is put in the proper way of reaching him.

In the case in hand, the plaintiff determined to accept. But a mental determination not indicated by speech, or put in course of indication by act to the other party, is not an acceptance which will bind the other. Nor does an act, which, in itself, is no indication of an acceptance, become such, because accompanied by an unevinced mental determination. Where the act uninterpreted by concurrent evidence of the mental purpose accompanying it, is as well referable to one state of facts as another, it is no indication to the other party of an acceptance, and does not operate to hold him to his offer.

Conceding that the testimony shows that the plaintiff did resolve to accept this offer, he did no act which indicated an acceptance of it to the defendants. He, a carpenter and builder, pur-

chased stuff for the work. But it was stuff as fit for any other like work. He began work upon the stuff, but as he would have done for any other like work. There was nothing in his thought formed but not uttered, or in his acts, that indicated or set in motion an indication to the defendants of his acceptance of their offer, or which could necessarily result therein.

But the charge of the learned judge was fairly to be understood by the jury as laying down the rule to them, that the plaintiff need not indicate to the defendants his acceptance of their offer; and that the purchase of stuff and working on it after receiving the note, made a binding contract between the parties. In this we think the learned judge fell into error.

The judgment appealed from must be reversed, and a new trial ordered, with costs to abide the event of the action.

All concur, but ALLEN, J., not voting.

Judgment reversed, and new trial ordered.

9 Cyc. 254 (67); 9 Cyc. 271 (65). W. P. 31 (36).

STENSGAARD *v.* SMITH.

43 MINNESOTA, 11.—1890.

DICKINSON, J. This action is for the recovery of damages for breach of contract. The rulings of the court below, upon the trial, were based upon its conclusion that no contract was shown to have been entered into between these parties. We are called upon to review the case upon this point. The plaintiff was engaged in business as a real-estate broker. On the 11th of December, 1886, he procured the defendant to execute the following instrument, which was mostly in printed form:

"ST. PAUL, Dec. 11, 1886.

"In consideration of L. T. Stensgaard agreeing to act as agent for the sale of the property hereinafter mentioned, I have hereby given to said L. T. Stensgaard the exclusive sale, for three months from date, of the following property, to wit: (Here follows a description of the property, the terms of sale, and some other provisions not necessary to be stated.) I further agree to pay said L. T. Stensgaard a commission of two and one-half per cent on the first $2000, and two and one-half per cent on the balance of the purchase price, for his services rendered in selling of the above-mentioned property, whether the title is accepted or not, and also whatever he may get or obtain for the sale of said property above $17,000 for such property, if the property is sold.

"JOHN SMITH."

The evidence showed that the plaintiff immediately took steps to effect the sale of the land, posted notices upon it, published advertisements in newspapers, and individually solicited purchasers. About a month subsequent to the execution by the defendant of the above in-

strument, he himself sold the property. This constitutes the alleged breach of contract for which a recovery of damages is sought.

The court was justified in its conclusion that no contract was shown too have been entered into, and hence that no cause of action was established. The writing signed by the defendant did not of itself constitute a contract between these parties. In terms indicating that the instrument was intended to be at once operative, it conferred present authority on the plaintiff to sell the land, and included the promise of the defendant that, if the plaintiff should sell the land, he should receive the stated compensation. This alone was no contract, for there was no mutuality of obligation, nor any other consideration for the agreement of the defendant. The plaintiff did not by this instrument obligate himself to do anything, and therefore the other party was not bound. Bailey v. Austrian, 19 Minn. 465 (535); Tarbox v. Gotzian, 20 Minn. 122 (139). If, acting under the authority thus conferred, the plaintiff had, before its revocation, sold the land, such performance would have completed a contract, and the plaintiff would have earned the compensation promised by the defendant for such performance. Andreas v. Holcombe, 22 Minn. 339; Ellsworth v. Southern Minn. Ry. Extension Co., 31 Minn. 543. But so long as this remained a mere present authorization to sell, without contract obligations having been fixed, it was revocable by the defendant. The instrument does, it is true, commence with the words: "In consideration of L. T. Stensgaard agreeing to act as agent for the sale of the property," etc.; but no such agreement on the part of the plaintiff was shown on the trial to have been actually made, although it was incumbent upon him to establish the existence of a contract as the basis of his action. This instrument does not contain an agreement on the part of the plaintiff, for he is no party to its execution. It expresses no promise or agreement except that of the defendant. It may be added that the language of the "consideration" clause is not such as naturally expresses the fact of an agreement having been already made on the part of the plaintiff. Of course, no consideration was necessary to support the present, but revocable, authorization to sell. It is difficult to give any practical effect to this clause in the construction of the instrument. It seems probable, in the absence of proof of such an agreement, that this clause had no reference to any actual agreement between these parties, but was a part of the printed matter which the plaintiff had prepared for use in his business, with the intention of making it effectual by his own signature. If he had appended to this instrument his agreement to accept the agency, or even if he had signed this instrument, this clause would have had an obvious meaning.

This instrument, executed only by the defendant, was effectual, as we have said, as a present, but revocable, grant of authority to sell.

It involved, moreover, an offer on the part of the defendant to contract with the plaintiff that the latter should have, for the period of three months, the exclusive right to sell the land. This action is based upon the theory that such a contract was entered into; but, to constitute such a contract, it was necessary that the plaintiff should in some way signify his acceptance of the offer, so as to place himself under the reciprocal obligation to exert himself during the whole period named to effect a sale. No express agreement was shown. The mere receiving and retaining this instrument did not import an agreement thus to act for the period named, for the reason that, whether the plaintiff should be willing to take upon himself that obligation or not, he might accept and act upon the revocable authority to sell expressed in the writing; and if he should succeed in effecting a sale before the power should be revoked, he would earn the commission specified. In other words, the instrument was presently effectual and of advantage to him, whether he chose to place himself under contract obligations or not. For the same reason the fact that for a day or a month he availed himself of the right to sell conferred by the defendant, by attempting to make a sale, does not justify the inference, in an action where the burden is on the plaintiff to prove a contract, that he had accepted the offer of the defendant to conclude a contract covering the period of three months, so that he could not have discontinued his efforts without rendering himself liable in damages. In brief, it was in the power of the plaintiff either to convert the defendant's offer and authorization into a complete contract, or to act upon it as a naked revocable power, or to do nothing at all. He appears to have simply availed himself, for about a month, of the naked present right to sell if he could do so. He cannot now complain that the landowner then revoked the authority which was still unexecuted. It may be added that there was no attempt at the trial to show that the plaintiff notified the defendant that he was endeavoring to sell the land; and there is but little, if any, ground for an inference from the evidence that the defendant in fact knew it.

The case is distinguishable from those where, under a unilateral promise, there has been a performance by the other party of services, or other thing to be done, *for which,* by the terms of the promise, compensation was to be made. Such was the case of Goward v. Waters (98 Mass. 596), relied upon by the appellant as being strictly analogous to this case. In the case before us, compensation was to be paid only in case of a sale of the land by the plaintiff. He can recover nothing for what he did, unless there was a complete contract; in which case, of course, he might have recovered damages for its breach. Order affirmed.[1]

9 Cyc. 327 (20); W. P. 35 (40).

[1] "In many cases also in which it is possible to make performance on one side

An offer or its acceptance or both may be made either by words or by conduct.

FOGG *v.* PORTSMOUTH ATHENÆUM.

44 NEW HAMPSHIRE, 115.—1862.

Assumpsit.

The case was submitted to the decision of the court upon the following agreed statement of facts:

The defendants are a corporation whose object is the support of a library and public reading-room, at which latter a large number of newspapers are taken. Some are subscribed and paid for by the defendants; others are placed there gratuitously by the publishers and others; and some are sent there apparently for advertising purposes merely, and of course gratuitously.

The Independent Democrat newspaper was furnished to the defendants, through the mail, by its then publishers, from Vol. 3, No. 1 (May 1, 1847). On the 29th day of November, 1848, a bill for the paper, from Vol. 3, No. 1 (May 1, 1847), to Vol. 5, No. 1 (May 1, 1849), two years, at $1.50 per year, was presented to the defendants by one T. H. Miller, agent for the then publishers, for payment. The defendants objected that they had never subscribed for the paper, and were not bound to pay for it. They at first refused on that ground to pay for it, but finally paid the bill to said Miller, and took upon the back thereof a receipt in the following words and figures:

"Nov. 29, 1848.

"The within bill paid this day, and the paper is henceforth to be discontinued.

"T. H. MILLER, for Hood & Co."

Hood & Co. were the publishers of the paper from May 1, 1847, until February 12, 1849, when that firm was dissolved, and the paper was afterward published by the present plaintiffs. The change of publishers was announced, editorially and otherwise, in the paper of February 15, 1849, and the names of the new publishers were conspicuously inserted in each subsequent number of the paper, but it did not appear that the change was actually known to Mr. Hatch,

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the consideration for a promise on the other side, it is not advisable to do so, for the reason that the promisor is not bound until the performance is completed, his offer (for such it is) being revocable in the meantime either by his own act or by the act of God. In particular, when the contract is for services which are not to be paid for until they are fully performed, the contract should always be bilateral; and hence it will always be presumed, in the absence of strong evidence to the contrary, that the parties intended to make it bilateral." Langdell, Contr. § 86.

the secretary and treasurer of the corporation, who settled the above-named bill, and who continued in the office till January, 1850.

The plaintiffs had no knowledge of the agreement of the agent of Hood & Co. to discontinue the paper, as set forth in the receipt of November 29, 1848, until notified thereof by the defendants, after they had furnished the paper to the defendants for a year or more; the books of Hood & Co., which came into their hands, only showing that the defendants had paid for the paper, in advance, to May 1, 1849.

After the payment of the bill and the giving of the receipt above recited, the paper continued to be regularly forwarded by its publishers, through the mail, to the defendants, from the date of said receipt until May 1, 1849, the expiration of the period named in said bill; and was in like manner forwarded from May 1, 1849, to January 1, 1860, or from Vol. 5, No. 1, to Vol. 15, No. 35, inclusive, the period claimed to be recovered for in this suit; and was during all that time constantly taken from the post-office by the parties employed by the defendants to take charge of their reading-room, build fires, etc., and placed in their reading-room. Payment was several times demanded during the latter period, of the defendants, by an agent or agents of the plaintiffs; but the defendants refused to pay, on the ground that they were not subscribers for the paper.

Conspicuously printed in each number of the paper sent to and received by the defendants were the following:

"Terms of Publication: By mail, express, or carrier, $1.50 a year, in advance; $2 if not paid within the year. No paper discontinued (except at the option of the publishers) unless all arrearages are paid."

The questions arising upon the foregoing case were reserved and assigned to the determination of the whole court.

NESMITH, J. There is no pretense upon the agreed statement of this case that the defendants can be charged upon the ground that they were subscribers for the plaintiffs' newspaper, or that they were liable in consequence of the existence of any express contract whatever. But the question now is, have the defendants so conducted as to make themselves liable to pay for the plaintiffs' newspaper for the six years prior to the date of the plaintiffs' writ, under an implied contract raised by the law and made applicable to this case.

If the seller does in any case what is usual, or what the nature of the case makes convenient and proper, to pass the effectual control of the goods from himself to the buyer, this is always a delivery. In like manner, as to the question of acceptance, we must inquire into the intention of the buyer, as evinced by his declarations and acts, the nature of the goods, and the circumstances of the case. If the buyer intend to retain possession of the goods, and manifests this intention

by a suitable act, it is an actual acceptance of them; or this intention may be manifested by a great variety of acts in accordance with the varying circumstances of each case. 2 Pars. on Con. 325.

Again, the law will imply an assumpsit, and the owner of goods has been permitted to recover in this form of action, where they have been actually applied, appropriated, and converted by the defendant to his own beneficial use. Hitchin v. Campbell, 2 W. Black, 827; Johnson v. Spiller, 1 Doug. 167; Hill v. Davis, 3 N. H. 384, and the cases there cited.

Where there has been such a specific appropriation of the property in question, the property passes, subject to the vendor's lien for the price. Rohde v. Thwaites, 6 B. & C. 392. In Baines v. Jevons (7 C. & P. 617) the question was, whether the defendant had purchased and accepted a fire engine. It was a question of fact for the jury to determine. Lord Abinger told the jury, if the defendant had treated the fire engine as his own, and dealt with it as such, if so, the plaintiff was entitled to recover for its price. And the jury so found. 2 Greenl. Ev. sec. 108.

In Weatherby v. Banham (5 C. & P. 228) the plaintiff was publisher of a periodical called the Racing Calendar. It appeared that he had for some years supplied a copy of that work, as fast as the numbers came out, to Mr. Westbrook; Westbrook died in the year 1820; the defendant, Banham, succeeded to Westbrook's property, and went to live in his house, and there kept an inn. The plaintiff, not knowing of Westbrook's death, continued to send the numbers of the Calendar, as they were published, by the stage-coach, directed to Westbrook. The plaintiff proved by a servant that they were received by the defendant, and no evidence was given that the defendant had ever offered to return them. The action was brought to recover the price of the Calendar for the years 1825 and 1826. Talford, for the defendant, objected that there never was any contract between the plaintiff and the present defendant, and that the plaintiff did not know him. But Lord Tenterden said: "If the defendant received the books and used them, I think the action is maintainable. Where the books come addressed to the deceased gentleman whose estate has come to the defendant, and he keeps the books, I think, therefore, he is clearly liable in this form of action, being for goods sold and delivered."

The preceding case is very similar, in many respects, to the case before us. Agreeably to the defendants' settlement with Hood & Co., their contract to take their newspaper expired on the first of May, 1849. It does not appear that the fact that the paper was then to stop was communicated to the present plaintiffs, who had previously become the proprietors and publishers of the newspaper establishment; having the defendants' name entered on their books, and having for some weeks before that time forwarded numbers of their

newspaper, by mail, to the defendants, they, after the first day of May, continued so to do up to January 1, 1860. During this period of time the defendants were occasionally requested, by the plaintiffs' agent, to pay their bill. The answer was, by the defendants, we are not subscribers to your newspaper. But the evidence is, the defendants used, or kept the plaintiffs' books, or newspapers, and never offered to return a number, as they reasonably might have done, if they would have avoided the liability to pay for them. Nor did they ever decline to take the newspapers from the post-office.

If the defendants would have avoided the liability to pay the plaintiffs, they might reasonably have returned the paper to the plaintiffs, or given them notice that they declined to take the paper longer.

We are of the opinion that the defendants have the right to avail themselves of the statute of limitations. Therefore, the plaintiffs can recover no more of their account than is embraced in the six years prior to the date of their writ, and at the sum of $2 per year, with interest, from date of writ, or the date of the earliest demand of the plaintiffs' claim upon the defendants.[1]

9 Cyc. 259 (94); W. P. 11 (8).

An offer is made when, and not until, it is communicated to the offeree.

(*i.*) *Ignorance of offered promise.*

FITCH *v.* SNEDAKER.

38 NEW YORK, 248.—1868.

[Reported herein at p. 69]

DAWKINS *v.* SAPPINGTON.

26 INDIANA, 199.—1866.

[Reported herein at p. 71]

(*ii.*) *Ignorance of offered act.*

BARTHOLOMEW *v.* JACKSON.

20 JOHNSON (N. Y.), 28.—1822.

In error, on *certiorari* to a justice's court. Jackson sued Bartholomew before a justice, for work and labor, etc. B. pleaded *non assumpsit*. It appeared in evidence, that Jackson owned a wheat stubble-field, in which B. had a stack of wheat, which he had prom-

[1] See also Realty Co. v. Pierson, 116 N. Y. Supplement, 547.

ised to remove in due season for preparing the ground for a fall crop. The time for its removal having arrived, J. sent a message to B., which, in his absence, was delivered to his family, requesting the immediate removal of the stack of wheat, as he wished, on the next day, to burn the stubble on the field. The sons of B. answered, that they would remove the stack by 10 o'clock the next morning. J. waited until that hour, and then set fire to the stubble, in a remote part of the field. The fire spreading rapidly, and threatening to burn the stack of wheat, and J., finding that B. and his sons neglected to remove the stack, set to work and removed it himself, so as to secure it for B.; and he claimed to recover damages for the work and labor in its removal. The jury gave a verdict for the plaintiff for 50 cents, on which the justice gave judgment, with costs.

PLATT, J. I should be very glad to affirm this judgment; for though the plaintiff was not legally entitled to sue for damages, yet to bring a *certiorari* on such a judgment was most unworthy. The plaintiff performed the service without the privity or request of the defendant, and there was, in fact, no promise, express or implied. If a man humanely bestows his labor, and even risks his life, in voluntarily aiding to preserve his neighbor's house from destruction by fire, the law considers the service rendered as *gratuitous*, and it, therefore, forms no ground of action. The judgment must be reversed.

Judgment reversed.

9 Cyc. 252 (61); W. P. 11 (9).

DEEMER, J., IN SHOEMAKER *v.* ROBERTS.

103 IOWA, 682.—1897.

That one who receives a newspaper without objection, and has the benefit thereof, is liable upon an implied contract to pay for the same, is conceded. But to establish such liability, it must be shown affirmatively that defendant received the paper, or such a state of facts must be recited as that the presumption arises that it was received by the person to whom it was addressed. No such presumption arises in the absence of proof that the address to which the paper is sent is the address of him from whom recovery is sought. Liability in such case is based upon the doctrine that when one accepts and receives the beneficial results of another's labor or services, which he has no reason to suppose were gratuitous, and which he could or not accept at his option, the law will imply a previous request and a promise to pay. Without proof of the acceptance of benefits, no such implication will obtain. In the case at bar there is no allegation that Ackley was the defendant's place of residence, no statement that he accepted or received the paper, no claim that the paper was sent

to the same address as appeared upon the subscription list, and no showing that his name was on the list by his authority.

(iii.) Ignorance of offered terms.

FONSECA *v.* CUNARD STEAMSHIP COMPANY.

153 MASSACHUSETTS, 553.—1891.

Contract, with a count in tort, against the defendant, as owner of the steamship Samaria, for damage to the plaintiff's trunk and its contents.

When the plaintiff engaged his passage in London, he received a passage ticket from the defendant's agent there. This ticket consisted of a sheet of paper of large quarto size, the face and back of which were covered with written and printed matter. Near the top of the face of the ticket, after the name of the defendant corporation and its list of offices in Great Britain, appeared in bold type the following: "Passengers' Contract Ticket." Upon the side margins were various printed notices to passengers, including the following:

"All passengers are requested to take notice that the owners of the ship do not hold themselves responsible for detention or delay arising from accident, extraordinary or unavoidable circumstances, nor for loss, detention, or damage to luggage."

The body of the face of the ticket contained statements of the rights of the passenger respecting his person and his baggage, the plaintiff's name, age, and occupation, the bills of fare for each day of the week, and the hours for meals, etc. At the bottom was printed the following:

"Passengers' luggage is carried only upon the conditions set forth on the back hereof."

Upon the back, among other printed matter, was the following:

"The company is not liable for loss or of injury to the passenger or his luggage, or delay in the voyage, whether arising from the act of God, the Queen's enemies, perils of the sea, rivers, or navigation, restraint of princes, rulers, and peoples, barratry, or negligence of the company's servants (whether on board the steamer or not), defect in the steamer, her machinery, gear, or fittings, or from any other cause of whatsoever nature."

When the plaintiff received his ticket, his attention was not called in any way to any limitation of the defendant's liability.

KNOWLTON, J. It is not expressly stated in the report, that the law of England was put in evidence as a fact in the case, but it seems to have been assumed at the trial, if not expressly agreed that this law should be considered, and the argument before this court has proceeded on the same assumption. It is conceded that the pre-

siding justice correctly found and ruled as follows: "That the contract was a British contract; that, by the English law, a carrier may by contract exempt himself from liability, even for loss caused by his negligence; that in this case, as the carrier has so attempted, and the terms are broad enough to exonerate him, the question remains of assent on the part of the plaintiff." That part of his ruling which is called in question by the defendant is as follows: "This has been decided in Massachusetts to be a question of evidence, in which the *lex fori* is to govern; that, although it has been decided that the law conclusively presumes that a consignor knows and assents to the terms of a bill of lading or a shipping receipt which he takes without dissent, yet a passenger ticket, even though it be called a 'contract ticket,' does not stand on the same footing; that in this case assent is not a conclusion of law, and is not proved as a matter of fact."

The principal question before us is whether the plaintiff, by reason of his acceptance, and use of his ticket, shall be conclusively held to have assented to its terms. It has often been decided, that one who accepts a contract, and proceeds to avail himself of its provisions, is bound by the stipulations and conditions expressed in it, whether he reads them or not. Rice v. Dwight Manuf. Co., 2 Cush. 80; Grace v. Adams, 100 Mass. 505; Hoadley v. Northern Transportation Co., 115 Mass. 304; Monitor Ins. Co. v. Buffum, 115 Mass. 343; Germania Insurance Co. v. Memphis & Charleston Railroad, 72 N. Y. 90. This rule is as applicable to contracts for the carriage of persons or property as to contracts of any other kind. Grace v. Adams, 100 Mass. 505; Boston & Maine Railroad v. Chipman, 146 Mass. 107; Parker v. South Eastern Railway, 2 C. P. D. 416, 428; Harris v. Great Western Railway, 1 Q. B. D. 515; York Co. v. Central Railroad, 3 Wall. 107; Hill v. Syracuse, Binghamton & New York Railroad, 73 N. Y. 351. The cases in which it is held that one who receives a ticket that appears to be a mere check showing the points between which he is entitled to be carried, and that contains conditions on its back which he does not read, is not bound by such conditions, do not fall within this rule. Brown v. Eastern Railroad, 11 Cush. 97; Malone v. Boston & Worcester Railroad, 12 Gray, 388; Henderson v. Stevenson, L. R. 2 H. L. Sc. 470; Quimby v. Vanderbilt, 17 N. Y. 306; Railway Co. v. Stevens, 95 U. S. 655. Such a ticket does not purport to be a contract which expressly states the rights of the parties, but only a check to indicate the route over which the passenger is to be carried, and he is not expected to examine it to see whether it contains any unusual stipulations. The precise question in the present case is whether the "contract ticket" was of such a kind that the passenger taking it should have understood that it was a contract containing stipulations which would determine the rights of the parties in reference to his carriage. If so, he would be expected to

read it, and if he failed to do so, he is bound by its stipulations. It covered with print and writing the greater part of two large quarto pages, and bore the signature of the defendant company, affixed by its agent, with a blank space for the signature of the passenger. The fact that it was not signed by the plaintiff is immaterial. Quimby v. Boston & Maine Railroad, 150 Mass. 365, and cases there cited. It contained elaborate provisions in regard to the rights of the passenger on the voyage, and even went into such detail as to give the bill of fare for each meal in the day for every day of the week. No one who could read could glance at it without seeing that it undertook expressly to prescribe the particulars which should govern the conduct of the parties until the passenger reached the port of destination. In that particular, it was entirely unlike the pasteboard tickets which are commonly sold to passengers on railroads. In reference to this question, the same rules of law apply to a contract to carry a passenger, as to a contract for the transportation of goods. There is no reason why a consignor who is bound by the provisions of a bill of lading, which he accepts without reading, should not be equally bound by the terms of a contract in similar form to receive and transport him as a passenger. In Henderson v. Stevenson, *ubi supra,* the ticket was for transportation a short distance, from Dublin to Whitehaven, and the passenger was held not bound to read the notice on the back, because it did not purport to be a contract, but a mere check given as evidence of his right to carriage. In later English cases, it is said that this decision went to the extreme limit of the law, and it has repeatedly been distinguished from cases where the ticket was in a different form. Parker v. South Eastern Railway, 2 C. P. D. 416, 428; Burke v. South Eastern Railway, 5 C. P. D. 1; Harris v. Great Western Railway, 1 Q. B. D. 515. The passenger in the last mentioned case had a coupon ticket, and it was held that he was bound to know what was printed as a part of the ticket. Steers v. Liverpool, New York & Philadelphia Steamship Co. (57 N. Y. 1) is in its essential facts almost identical with the case at bar, and it was held that the passenger was bound by the conditions printed on the ticket. In Quimby v. Boston & Maine Railroad, *ubi supra,* the same principle was applied to the case of a passenger travelling on a free pass, and no sound distinction can be made between that case and the case at bar.

We are of opinion that the ticket delivered to the plaintiff purported to be a contract, and that the defendant corporation had a right to assume that he assented to its provisions. All these provisions are equally binding on him as if he had read them.

The contract being valid in England, where it was made, and the plaintiff's acceptance of it under the circumstances being equivalent to an express assent to it, and it not being illegal or immoral, it will

be enforced here, notwithstanding that a similar contract made in Massachusetts would be held void as against public policy. Greenwood v. Curtis, 6 Mass. 358; Forepaugh v. Delaware, Lackawanna & Western Railroad, 128 Penn. St. 217, and cases cited; *In re* Missouri Steamship Co., 42 Ch. D. 321, 326, 327; Liverpool and Great Western Steam Co. v. Phenix Ins. Co., 129 U. S. 397.

Judgment for the defendant.[1]

9 Cyc. 261 (5-8); W. P. 53 (61).

MALONE *v.* BOSTON & WORCESTER RAILROAD.

12 GRAY (MASS.), 388.—1859.

Action of tort against the defendants as common carriers, for the loss upon their railroad of a trunk and its contents.

The ticket issued to plaintiff had printed upon its face, "Look on the back." On the back was a clause limiting the liability of defendant for baggage to fifty dollars, and a notice that other regulations were posted in the cars. In the cars was a similar notice as to liability for baggage. Plaintiff testified that he never saw the notice on the ticket or in the car.

The trial judge submitted to the jury the question whether the plaintiff ever assented to the limitation, and charged that the receiving of the ticket raised no legal presumption that plaintiff had the necessary notice. The jury returned a verdict for the plaintiff.

DEWEY, J. This case must be held to be analogous to the case of Brown v. Eastern Railroad (11 Cush. 97), and may, like that, be decided without any adjudication upon the broader question whether a limitation of the liability of the railroad company as to the amount and value of the baggage of passengers transported on the road may not be effectually secured by the delivery of a ticket to the passenger so printed in large and fair type on the face of the ticket, that no one could read the part of the ticket indicating the place to which it purports to entitle him to be conveyed without also having brought to his notice the fact of limitation as to liability for his baggage. The present case as to the ticket only differs from the case of Brown v. Eastern Railroad, in having printed in small type on the face of the ticket, "Look on the back." But there is nothing on the face of the ticket alluding to the subject of baggage; no notice to look on the back for regulations as to baggage. The delivery of such a ticket does not entitle the railroad company to ask for instructions that there results therefrom a legal presumption of notice of the restricted liability as to the baggage of the passenger. The ruling as to the placards posted in the cars was correct, and no legal presumption of

[1] But see The Majestic, 166 U. S. 375.

notice arose therefrom. The court properly submitted the question of notice to the jury as a question of fact.

We have not particularly considered the question of liability of the defendants as to certain small items, if any, of the wearing apparel of the husband, that were contained in the lost trunk. The articles are stated in the bill of exceptions to have been "nearly wholly his wife's wearing apparel," and the court was not asked to direct the jury to exclude the other articles in assessing damages. Without expressing any opinion upon the point whether these articles, if any, of the husband's would be embraced in the baggage which the defendants assumed to transport as common carriers, the husband paying no fare for his personal transportation, the court are of opinion that in the present aspect of the case judgment should be entered generally on the verdict.

Exceptions overruled.

9 Cyc. 260–263 (7–17); W. P. 53 (61).

SPRINGER *v.* WESTCOTT.

166 NEW YORK, 117.—1901.

This action was brought to recover damages from the defendant, an unincorporated baggage express company, for breach of its contract to deliver a trunk and contents to the plaintiff. The answer was in substance a general denial.

On Saturday, September 14th, 1889, the plaintiff delivered her trunk to the New York Central & Hudson River Railroad Company at Troy and caused it to be checked from that place to the city of New York. The trunk was then in good order and filled with ladies' clothing, jewelry, etc. The plaintiff took passage upon the same train that carried her trunk, which arrived at the city of New York in the evening between 8 and 9 o'clock. On the way, after dark, at a point "nearer New York than Poughkeepsie," a messenger of the defendant came through the train soliciting baggage. The plaintiff gave him her check, paid him 40 cents and told him to send her trunk to No. 222 East 71st street. He gave her a paper, with some printing on it, such as she had received on similar occasions before, but which she did not read and she never knew what they contained. It was "folded up," and she put it in her pocket without trying to read it. He did not tell her, and she did not know, what its contents were. In fact it was a receipt purporting to limit the company's liability for the trunk and contents "by reason of negligence or otherwise" to an amount not exceeding $100. The check was never returned to the plaintiff, but, without any explanation, the trunk was delivered by the defendant at No. 222 East 71st street about noon

on Tuesday, September 17th. It then had a yellow label of the defendant pasted upon it, but was covered with dirt, the lock was broken, the straps were hanging out, some of the compartments and all of the contents were gone, except a hat frame from which the lace had been stripped.

VANN, J. . . . The defendant claims that the trial court erred in refusing to submit to the jury the questions whether the plaintiff knew that the writing or printing on the paper delivered to her by the messenger contained conditions relating to the terms of the contract, and whether the defendant did what was reasonably sufficient to give the plaintiff notice of such conditions.

Upon this subject the trial judge, after reading the contents of the paper to the jury, charged as follows: "The defendant claims that the plaintiff knew the contents of the paper, because she had on previous occasions, while travelling on said railroad, had her baggage sent by the defendant's agent, and had received from him a receipt with some printing on it and of the same kind as the one in question. If you find from the entire evidence, and under the instructions of the court, that the plaintiff knew the character of the paper so received by her from the defendant's agent, or accepted it with notice of its contents, or with notice that it contained the terms of a special contract, so as to make her acquaint herself with its contents, and neglected to do so, the limitation of $100 applies, and in that event, even though you may find the plaintiff is entitled to your verdict, she cannot recover more than such sum. If, however, you find from all the circumstances that the plaintiff did not know the paper writing in question was proffered as a contract, and received it not knowing its contents and satisfied it was given her simply to enable her to trace her property, or a mere receipt, then the plaintiff is not bound by its limitation, and you may, if you find she is entitled to recover, render a verdict in her favor for the value of the goods which you find were lost."

We think this was all that the defendant could require, and that its requests for further instructions upon the subject were properly refused. Madan v. Sherard, 73 N. Y. 329; Grossman v. Dodd, 63 Hun, 324, affirmed 137 N. Y. 599; Zimmer v. N. Y. C. & H. R. R. Co., 137 N. Y. 464. . . .

6 Cyc. 405 (20).

Communication of acceptance.

ROYAL INS. CO. *v.* BEATTY.

119 PENNSYLVANIA STATE, 6.—1888.

Assumpsit to recover upon two policies of insurance.

At the close of the testimony, the defendant requested the court

to charge the jury that there was no evidence of an acceptance by the defendant of the offer of the plaintiff to renew the policies, and to direct a verdict for the defendant. The court refused the request, and submitted the question to the jury. Verdict for plaintiff.

GREEN, J. We find ourselves unable to discover any evidence of a contractual relation between the parties to this litigation. The contract alleged to exist was not founded upon any writing, nor upon any words, nor upon any act done by the defendant. It was founded alone upon silence. While it must be conceded that circumstances may exist which will impose a contractual obligation by mere silence, yet it must be admitted that such circumstances are exceptional in their character, and of extremely rare occurrence. We have not been furnished with a perfect instance of the kind by the counsel on either side of the present case. Those cited for defendant in error had some other element in them than mere silence, which contributed to the establishment of the relation.

But in any point of view it is difficult to understand how a legal liability can arise out of the mere silence of the party sought to be affected, unless he was subject to a duty of speech, which was neglected to the harm of the other party. If there was no duty of speech, there could be no harmful omission arising from mere silence. Take the present case as an illustration. The alleged contract was a contract of fire insurance. The plaintiff held two policies against the defendant, but they had expired before the loss occurred and had not been formally renewed. At the time of the fire, the plaintiff held no policy against the defendant. But he claims that the defendant agreed to continue the operation of the expired policies by what he calls "binding" them. How does he prove this? He calls a clerk, who took the two policies in question, along with other policies of another person, to the agent to have them renewed, and this is the account he gives of what took place: "The Royal Company had some policies to be renewed, and I went in and bound them. *Q.* State what was said and done. *A.* I went into the office of the Royal Company and asked them to bind the two policies of Mr. Beatty expiring to-morrow. The court: Who were the policies for? *A.* For Mr. Beatty. The court: That is your name, is it not? *A.* Yes, sir. These were the policies in question. I renewed the policies of Mr. Priestly up to the 1st of April. There was nothing more said about the Beatty policies at that time. The court: What did they say? *A.* They did not say anything, but I suppose that they went to their books to do it. They commenced to talk about the night privilege, and that was the only subject discussed." In his further examination he was asked: "*Q.* Did you say anything about those policies (Robert Beatty's) at that time? *A.* No, sir; I only spoke of the two policies for William Beatty. *Q.* What did you say about

them? *A.* I went in and said, 'Mr. Skinner, will you renew the Beatty policies and the night privilege for Mr. Priestly?' and that ended it. *Q.* Were the other companies bound in the same way? *A.* Yes, sir; and I asked the Royal Company to bind Mr. Beatty."

The foregoing is the whole of the testimony for the plaintiff as to what was actually said at the time when it is alleged the policies were bound. It will be perceived that all that the witness says is, that he asked the defendant's agent to bind the two policies, as he states at first, or to renew them, as he says last. He received no answer, nothing was said, nor was anything done. How is it possible to make a contract out of this? It is not as if one declares or states a fact in the presence of another and the other is silent. If the declaration imposed a duty of speech on peril of an inference from silence, the fact of silence might justify the inference of an admission of the truth of the declared fact. It would then be only a question of hearing, which would be chiefly if not entirely for the jury. But here the utterance was a question and not an assertion, and there was no answer to the question. Instead of silence being evidence of an agreement to do the thing requested, it is evidence, either that the question was not heard, or that it was not intended to comply with the request. Especially is this the case when, if a compliance was intended, the request would have been followed by an actual doing of the thing requested. But this was not done; how then can it be said it was agreed to be done? There is literally nothing upon which to base the inference of an agreement, upon such a state of facts. Hence the matter is for the court and not for the jury; for if there may not be an inference of the controverted fact, the jury must not be permitted to make it.

What has thus far been said relates only to the effect of the non-action of the defendant, either in responding or in doing the thing requested. There remains for consideration the effect of the plaintiff's non-action. When he asked the question whether defendant would bind or renew the policies and obtained no answer, what was his duty? Undoubtedly to repeat his question until he obtained an answer. For his request was that the defendant should make a contract with him, and the defendant says nothing. Certainly such silence is not an assent in any sense. There should be something done, or else something said before it is possible to assume that a contract was established. There being nothing done and nothing said, there is no footing upon which an inference of an agreement can stand. But what was the position of the plaintiff? He had asked the defendant to make a contract with him and the defendant had not agreed to do so; he had not even answered the question whether he would do so. The plaintiff knew he had obtained no answer, but he does not repeat the question; he, too, is silent thereafter, and he

does not get the thing done which he asks to be done. Assuredly it was his duty to speak again, and to take further action if he really intended to obtain the defendant's assent. For what he wanted was something affirmative and positive, and without it he has no status. But he desists, and does and says nothing further. And so it is that the whole of the plaintiff's case is an unanswered request to the defendant to make a contract with the plaintiff, and no further attempt by the plaintiff to obtain an answer, and no actual contract made. Out of such facts it is not possible to make a legal inference of a contract.

The other facts proved and offered to be proved, but rejected improperly, as we think, and supposed by each to be consistent with his theory, tend much more strongly in favor of the defendant's theory than of the plaintiff's. It is not necessary to discuss them, since the other views we have expressed are fatal to the plaintiff's claim. Nor do I concede that if defendant heard plaintiff's request and made no answer, an inference of assent should be made. For the hearing of a request and not answering it is as consistent, indeed, more consistent, with a dissent than an assent. If one is asked for alms on the street, and hears the request, but makes no answer, it certainly cannot be inferred that he intends to give them. In the present case there is no evidence that defendant heard the plaintiff's request, and without hearing there was, of course, no duty of speech.

Judgment reversed.[1]

9 Cyc. 258–260 (91–98); W. P. 10 (5).

[1] In Prescott v. Jones, 69 N. H. 305, the declaration alleged, in substance, that the defendants, as insurance agents, had insured the plaintiff's buildings in the Manchester Fire Insurance Company until February 1, 1897; that on January 23, 1897, they notified him by letter that they would renew the policy and insure his buildings for a further term of one year from February 1, 1897, in the sum of $500, unless notified to the contrary by him; that he, relying on the promise to insure unless notified to the contrary, and believing, as he had a right to believe, that the buildings would be insured by the defendants for one year from February 1, 1897, gave no notice to them to insure or not to insure; that they did not insure the buildings as they had agreed and did not notify him of their intention not to do so; that the buildings were destroyed by fire March 1, 1897, without fault on the plaintiff's part. The defendants demurred. The court held if "the defendants might and did make their offer in such a way as to dispense with the communication of its acceptance to them in a formal and direct manner, they did not and could not so frame it as to render the plaintiff liable as having accepted it merely because he did not communicate his intention not to accept it. And if the plaintiff was not bound by the offer until he accepted it, the defendants could not be, because 'it takes two to make a bargain,' and as contracts rest on mutual promises, both parties are bound, or neither is bound. . . . All the plaintiff did was merely to determine in his own mind that he would accept the offer—for there was nothing whatever to indicate it by way of speech or other appropriate act. Plainly, this did not create any rights in his favor as against

HOBBS *v.* MASSASOIT WHIP CO.

158 MASSACHUSETTS, 194.—1893.

HOLMES, J. This is an action for the price of eelskins sent by the plaintiff to the defendant, and kept by the defendant some months, until they were destroyed. It must be taken that the plaintiff received no notice that the defendants declined to accept the skins. The case comes before us on exceptions to an instruction to the jury, that, whether there was any prior contract or not, if the skins are sent to the defendant, and it sees fit, whether it has agreed to take them or not, to lie back, and to say nothing, having reason to suppose that the man who has sent them believes that it is taking them, since it says nothing about it, then, if it fails to notify, the jury would be warranted in finding for the plaintiff.

Standing alone, and unexplained, this proposition might seem to imply that one stranger may impose a duty upon another, and make him a purchaser, in spite of himself, by sending goods to him, unless he will take the trouble, and be at the expense, of notifying the sender that he will not buy. The case was argued for the defendant on that interpretation. But, in view of the evidence, we do not understand that to have been the meaning of the judge, and we do not think that the jury can have understood that to have been his meaning. The plaintiff was not a stranger to the defendant, even if there was no contract between them. He had sent eelskins in the same way four or five times before, and they had been accepted and paid for. On the defendant's testimony, it is fair to assume that, if it had admitted the eelskins to be over twenty-two inches in length, and fit for its business, as the plaintiff testified, and the jury found that they were, it would have accepted them; that this was understood by the plaintiff; and, indeed, that there was a standing offer to him for such skins. In such a condition of things, the plaintiff was warranted in sending the defendant skins conforming to the requirements, and even if the offer was not such that the contract was made as soon as skins corresponding to its terms were sent, sending them did impose on the defendant a duty to act about them; and silence on its part, coupled with a retention of the skins for an unreasonable time, might

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the defendants. From the very nature of the contract this must be so; and it therefore seems superfluous to add that the universal doctrine is that an uncommunicated mental determination cannot create a binding contract. Nor is there any estoppel against the defendants, on the ground that the plaintiff relied upon their letter and believed they would insure his buildings as therein stated. The letter was a representation only of a present intention or purpose on their part. 'It was not a statement of a fact or state of things actually existing, or past and executed, on which a party might reasonably rely as fixed and certain, and by which he might properly be guided in his conduct.' . . ."

be found by the jury to warrant the plaintiff in assuming that they were accepted, and thus to amount to an acceptance. See Bushell v. Wheeler, 15 Q. B. 442; Benjamin on Sales, §§ 162, 164; Taylor v. Dexter Engine Co., 146 Mass. 613, 615. The proposition stands on the general principle that conduct which imports acceptance or assent is acceptance or assent in the view of the law, whatever may have been the actual state of mind of the party,—a principle sometimes lost sight of in the cases. O'Donnell v. Clinton, 145 Mass. 461, 463; McCarthy v. Boston & Lowell Railroad, 148 Mass. 550, 552.

Exceptions overruled.[1]

Acceptance is communicated when it is made in a manner prescribed, or indicated by the offeror.

TAYLOE *v.* MERCHANTS' FIRE INS. CO.

9 HOWARD (U. S.), 390.—1850.

NELSON, J. This is an appeal from a decree of the Circuit Court for the District of Maryland, which was rendered for the defendants.

The case in the court below was this. William H. Tayloe, of Richmond County, Virginia, applied to John Minor, the agent of the defendants, residing at Fredericksburg in that State, for an insurance upon his dwelling-house to the amount of $8000 for one year, and, as he was about leaving home for the State of Alabama, desired the agent to make the application in his behalf.

The application was made accordingly, under the date of 25th November, 1844, and an answer received from the secretary of the company, stating that the risk would be taken at seventy cents on the thousand dollars, the premium amounting to the sum of fifty-six dollars. The agent stated in the application to the company the reason why it had not been signed by Tayloe; that he had gone to the State of Alabama on business, and would not return till Febru-

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[1] In Day v. Caton, 119 Mass. 513, the court said: "If a person saw day after day a laborer at work in his field doing services, which must of necessity inure to his benefit, knowing that the laborer expected pay for his work, when it was perfectly easy to notify him if his services were not wanted, even if a request were not expressly proved, such a request, either previous to or contemporaneous with the performance of the services, might fairly be inferred. But if the fact was merely brought to his attention upon a single occasion and casually, if he had little opportunity to notify the other that he did not desire the work and should not pay for it, or could only do so at the expense of much time and trouble, the same inference might not be made. The circumstances of each case would necessarily determine whether silence with a knowledge that another was doing valuable work for his benefit, and with the expectation of payment, indicated that consent which would give rise to the inference of a contract. The question would be one for the jury, and to them it was properly submitted in the case before us by the presiding judge."

ary following; and that he was desired to communicate to him at that place the answer of the company.

On receiving the answer, the agent mailed a letter directed to Tayloe, under date of the 2d of December, advising him of the terms of the insurance, and adding, "Should you desire to effect the insurance, send me your check payable to my order for $57, and the business is concluded." The additional dollar was added for the policy.

This letter, in consequence of a misdirection, did not reach Tayloe till the 20th of the month; who, on the next day, mailed a letter in answer to the agent, expressing his assent to the terms, and inclosing his check for the premium as requested. He also desired that the policy should be deposited in the bank for safe-keeping. This letter of acceptance was received on the 31st at Fredericksburg by the agent, who mailed a letter in answer the next day, communicating to Tayloe his refusal to carry into effect the insurance, on the ground that his acceptance came too late, the centre building of the dwelling-house in the meantime, on the 22d of the month, having been consumed by fire.

The company, on being advised of the facts, confirmed the view taken of the case by their agent, and refused to issue the policy or pay the loss.

A bill was filed in the court below by the insured against the company, setting forth, substantially, the above facts, and praying that the defendants might be decreed to pay the loss, or for such other relief as the complainant might be entitled to.

I. Several objections have been taken to the right of the complainant to recover, which it will be necessary to notice; but the principal one is, that the contract of insurance was not complete at the time the loss happened, and therefore that the risk proposed to be assumed had never attached.

Two positions have been taken by the counsel for the company for the purpose of establishing this ground of defense.

1. The want of notice to the agent of the company of the acceptance of the terms of the insurance; and,

2. The non-payment of the premium.

The first position assumes that, where the company have made an offer through the mail to insure upon certain terms, the agreement is not consummated by the mere acceptance of the offer by the party to whom it is addressed; that the contract is still open and incomplete until the notice of acceptance is received; and that the company are at liberty to withdraw the offer at any time before the arrival of the notice; and this even without communicating notice of the withdrawal to the applicant; in other words, that the assent of the company, expressed or implied, after the acceptance of the terms

proposed by the insured, is essential to a consummation of the contract.

The effect of this construction is, to leave the property of the insured uncovered until his acceptance of the offer has reached the company, and has received their assent; for, if the contract is incomplete until notice of the acceptance, till then the company may retract the offer, as neither party is bound until the negotiation has resulted in a complete bargain between the parties.

In our apprehension, this view of the transaction is not in accordance with the usages and practice of these companies in taking risks; nor with the understanding of merchants and other business men dealing with them; nor with the principles of law, settled in analogous cases, governing contracts entered into by correspondence between parties residing at a distance.

On the contrary, we are of opinion that an offer under the circumstances stated, prescribing the terms of insurance, is intended, and is to be deemed, a valid undertaking on the part of the company, that they will be bound, according to the terms tendered, if an answer is transmitted in due course of mail, accepting them; and that it cannot be withdrawn, unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted.

This view of the effect of the correspondence seems to us to be but carrying out the intent of the parties, as plainly manifested by their acts and declarations.

On the acceptance of the terms proposed, transmitted by due course of mail to the company, the minds of both parties have met on the subject, in the mode contemplated at the time of entering upon the negotiation, and the contract becomes complete. The party to whom the proposal is addressed has a right to regard it as intended as a continuing offer until it shall have reached him, and shall be in due time accepted or rejected.

Such is the plain import of the offer. And besides, upon any other view, the proposal amounts to nothing, as the acceptance would be but the adoption of the terms tendered, to be, in turn, proposed by the applicant to the company for their approval or rejection. For, if the contract is still open until the company is advised of an acceptance, it follows, of course, that the acceptance may be repudiated at any time before the notice is received. Nothing is effectually accomplished by an act of acceptance.

It is apparent, therefore, that such an interpretation of the acts of the parties would defeat the object which both had in view in entering upon the correspondence.

The fallacy of the argument, in our judgment, consists in the assumption, that the contract cannot be consummated without a

knowledge on the part of the company that the offer has been accepted. This is the point of the objection. But a little reflection will show, that in all cases of contracts entered into between parties at a distance by correspondence, it is impossible that both should have a knowledge of it the moment it becomes complete. This can only exist where both parties are present.

The position may be illustrated by the case before us. If the contract became complete, as we think it did, on the acceptance of the offer by the applicant, on the 21st December, 1844, the company, of course, could have no knowledge of it until the letter of acceptance reached the agent, on the 31st of the month; and, on the other hand, upon the hypothesis it was not complete until notice of the acceptance, and then became so, the applicant could have no knowledge of it at the time it took effect. In either aspect, and, indeed, in any aspect in which the case can be presented, one of the parties must be unadvised of the time when the contract takes effect, as its consummation must depend upon the act of one of them in the absence of the other.

The negotiation being carried on through the mail, the offer and acceptance cannot occur at the same moment of time; nor, for the same reason, can the meeting of the minds of the parties on the subject be known by each at the moment of concurrence; the acceptance must succeed the offer after the lapse of some interval of time; and if the process is to be carried farther in order to complete the bargain, and notice of the acceptance must be received, the only effect is to reverse the position of the parties, changing the knowledge of the completion from one party to the other.

It is obviously impossible, therefore, under the circumstances stated, ever to perfect a contract by correspondence, if a knowledge of both parties at the moment they become bound is an essential element in making out the obligation. And as it must take effect, if effect is given at all to an endeavor to enter into a contract by correspondence, in the absence of the knowledge of one of the parties at the time of its consummation, it seems to us more consistent with the acts and declarations of the parties, to consider it complete on the transmission of the acceptance of the offer in the way they themselves contemplated; instead of postponing its completion till notice of such acceptance has been received and assented to by the company.

For why make the offer, unless intended that an assent to its terms should bind them? And why require any further assent on their part, after an unconditional acceptance by the party to whom it is addressed?

We have said that this view is in accordance with the usages and practice of these companies, as well as with the general prin-

ciples of law governing contracts entered into by absent parties.

In the instructions of this company to their agent at Fredericksburg, he is advised to transmit all applications for insurance to the office for consideration; and that, upon the receipt of an answer, if the applicant accepts the terms, the contract is considered complete without waiting to communicate the acceptance to the company; and the policy to be thereafter issued is to bear date from the time of the acceptance.

The company desire no further communication on the subject, after they have settled upon the terms of the risk, and sent them for the inspection of the applicant, in order to the consummation of the bargain. The communication of the acceptance by the agent afterwards is to enable them to make out the policy. The contract is regarded as complete on the acceptance of the terms.

This appears, also, to have been the understanding of the agent; for, on communicating to the insured the terms received from the company, he observes, "Should you desire to effect the above insurance, send me your check payable to my order for fifty-seven dollars, and the business is concluded"; obviously enough importing, that no other step would be necessary to give effect to the insurance of the property upon the terms stated.[1]

The cases of Adams v. Lindsell (1 Barn. & Ald., 681) and Mactier's Adm'rs v. Frith (6 Wend. 104) are authorities to show that the above view is in conformity with the general principles of law governing the formation of all contracts entered into between parties residing at a distance by means of correspondence.

The unqualified acceptance by the one of the terms proposed by the other, transmitted by due course of mail, is regarded as closing the bargain from the time of the transmission of the acceptance.

This is also the effect of the case of Eliason v. Henshaw (4 Wheat. 228) in this court, though the point was not necessarily involved in the decision of the case. The acceptance there had not been according to the terms of the bargain proposed, for which reason the plaintiff failed.

2. The next position against the claim is the non-payment of the premium.

One of the conditions annexed to the policies of the company is, that no insurance will be considered as made or binding until the premium be actually paid; and one of the instructions to the agent was, that no credit should be given for premiums under any circumstances.

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[1] "In Tayloe v. Merchants Fire Ins. Co., the defendant's offer contemplated a unilateral contract, and this offer was accepted and the consideration paid the moment when the plaintiff sent his check for the premium."—Langdell, Contr. p. 17.

But the answer to this objection is, that the premium, in judgment of law, was actually paid at the time the contract became complete. The mode of payment had not been prescribed by the company, whether in specie, bills of a particular bank, or otherwise; the agent, therefore, was at liberty to exercise a discretion in the matter, and prescribe the mode of payment; and, accordingly, we find him directing, in this case, that it may be paid by a check payable to his order for the amount. It is admitted that the insured had funds in the bank upon which it was drawn, at all times from the date of the check till it was received by the agent, sufficient to meet it; and that it would have been paid on presentment.

It is not doubted that, if the check for the premium had been received by the agent from the hands of the insured, it would have been sufficient; and in the view we have taken of the case, the transmission of it by mail, according to the directions given, amounts, in judgment of law, to the same thing. Doubtless, if the check had been lost or destroyed in the transmission, the insured would have been bound to make it good; but the agent, in this respect, trusted to his responsibility, having full confidence in his ability and good faith in the transaction.

. . . . . .

Decree reversed.[1]

9 Cyc. 295-296 (67-70); W. P. 31 (35); 39 (42). Ashley, Formation of contract *inter absentes*, 2 C. L. R. 1.

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[1] The letter of acceptance must be properly addressed and bear the postage prepaid, Blake v. Ins. Co. 67 Tex. 160. Delivery to a carrier whose duty it is to receive mail (Pearce v. Langfit, 101 Pa. 507) or depositing in a street letter box (Watson v. Russell, 149 N. Y. 388) is sufficent. Upon the effect of the U. S. postal regulations as to the sender's right to withdraw a letter from the mail, see 7 H. L. R. 301.

Convenience of the rule.—In Household Fire Ins. Co. v. Grant, L. R. 4 Exch. 216, Thesiger, L. J., says: "There is no doubt that the implication of a complete, final, and absolutely binding contract being formed, as soon as the acceptance of an offer is posted, may in some cases lead to inconvenience and hardship. But such there must be at times in every view of the law. It is impossible in transactions which pass between parties at a distance, and have to be carried on through the medium of correspondence, to adjust conflicting rights between innocent parties, so as to make the consequences of mistake on the part of a mutual agent fall equally upon the shoulders of both. At the same time I am not prepared to admit that the implication in question will lead to any great or general inconvenience or hardship. An offerer, if he chooses, may always make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance. If he trusts to the post he trusts to a means of communication which, as a rule, does not fail, and if no answer to his offer is received by him, and the matter is of importance to him, he can make inquiries of the person to whom his offer was addressed. On the other hand, if the contract is not finally concluded, except in the event of the acceptance actually reaching the offerer, the door

BRAUER *v.* SHAW

168 MASSACHUSETTS, 198.—1897.

Two actions by William W. Brauer and others against Frank Shaw and others for breach of contracts. The cases were tried together, and a verdict ordered for defendants. Plaintiffs except.

HOLMES, J. These are two actions of contract on alleged con-

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would be opened to the perpetration of much fraud, and, putting aside this consideration, considerable delay in commercial transactions, in which despatch is, as a rule, of the greatest consequence, would be occasioned; for the acceptor would never be entirely safe in acting upon his acceptance until he had received notice that his letter of acceptance had reached its destination."

Theory of the rule.—Lord Herschell, in Henthorn v. Fraser, [1892] 2 Ch. 27, C. A., says: "I am not sure that I should myself have regarded the doctrine that an acceptance is complete as soon as the letter containing it is posted as resting upon an implied authority by the person making the offer to the person receiving it to accept by those means. It strikes me as somewhat artificial to speak of the person to whom the offer is made as having the implied authority of the other party to send his acceptance by post. He needs no authority to transmit the acceptance through any particular channel; he may select what means he pleases, the post-office no less than any other. The only effect of the supposed authority is to make the acceptance complete so soon as it is posted, and authority will obviously be implied only when the tribunal considers that it is a case in which this result ought to be reached. I should prefer to state the rule thus: Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted."

Implication of method of acceptance.—In Perry v. Mt. Hope Co., 15 R. I. 380, it was held that where an offer was made orally in Boston, the offer to stand open until the next day, and the offer was accepted by telegraph the next day from Providence, R. I., the contract "was completed in Rhode Island," by the transmission of the telegram, which was duly received by the offeror.

In Bal v. Van Staden, Transvaal L. R. 1902, p. 128, (digested 20 South African L. J. 407) it is held that the doctrine that the acceptance is complete as soon as the letter of acceptance has been posted is not applicable where, at the time of posting there was, owing to the existence of a state of war, no regular postal communication between the residences of the respective parties. Solomon, J., said: "The chief ground for the decisions of the English courts, viz. the regularity of the post, is cut away and I do not therefore think that it can be held that the contract was complete as soon as the letter was posted." See the commentary on this case, 17 H. L. R. 342.

In Lucas v. Western Union Telegraph Co., 131 Ia, 669, an offer was made by mail and the acceptance was sent by telegraph. The court said: "The party making the offer may be entirely satisfied to trust the mails and not be willing to chance the use of the telegraph. . . . In the absence of any suggestion, one transmitting an offer by mail cannot be bound by an acceptance returned in some other way until it is received or he has notice thereof."

In Scottish Amer. Co. v. Davis, 96 Tex. 504, an offer was made to the

tracts letting all the cattle-carrying space on the Warren Line of steamships for the May sailings from Boston to Liverpool, the first contract at the rate of fifty shillings a head, the second and alternative one at fifty-two shillings and six pence. As we are all of opinion that, for one reason or another, the right to recover upon the first contract is not made out, it may be stated shortly. On April 15, 1892, after earlier correspondence, the defendants wrote, stating terms, saying that they had telegraphed that they "would probably accept 50*s.*, if reply promptly," referring to an answer asking to have the space kept until noon the next day, and to their reply that they would "try to keep space for you," and adding that there were several customers, and that they should feel "duty bound to let it to the first man making the best bid." The plaintiffs' agents telegraphed at fifty-three minutes past eight the next morning, making a modified offer. Whether they had received the above letter does not appear. The defendants answered, "Referring our letter yesterday, first offer for number named has preference, three parties considering. Wire quick if you want it." This was received in the New York telegraph office at fifteen minutes past ten. At twenty minutes past ten the plaintiffs' agents telegraphed, "Have closed all your May spaces as per letter," etc. This is relied on as making the contract. It does not appear whether the telegram which arrived only five minutes before had been received. If not, and, if the last

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offeree, Couts. The acceptance was mailed by Couts. The court held that as the offer was not made by mail "there was no implied authority for Couts to accept by mail except by actual delivery of his acceptance," and that Couts had a right to intercept the letter and withdraw it from the mail as he did.

Argument that the acceptance must be received.—The view of Professor Langdell, Contr. § 14, sustained by McCulloch v. Ins. Co., 1 Pick. 278, is "that the acceptance of the original offer, in the case of a bilateral contract, must be expressed, i. e., must be made by words or signs; and that the reason for this is, that the acceptance contains a counter-offer. Moreover, the reason why the counter-offer makes it necessary that the acceptance should be expressed is, that communication to the offeree is of the essence of every offer. The acceptance, therefor, must be communicated to the original offerer, and until such communication the contract is not made. When the parties are together and contract orally, no question can often arise as to communication; but when they are at a distance from each other and contract by letter, such a question frequently arises. The principle, however, is the same in both cases. In contracts *inter praesentes* the words or signs must be both heard or seen and understood; in contracts *inter absentes* the letter must be received and read." McCulloch v. Ins. Co., *supra*, is probably now overruled in Massachusetts, (see Brauer v. Shaw, and Bishop v. Eaton *infra*), and the rule that the acceptance is made by proper transmission is now general throughout the United States. For a statement of the rules in continental and other foreign countries as to the formation of contract by correspondence, see 4 Michigan Law Review, 466; 32 American Law Review, 339.

telegram was in answer to the letter only, the plaintiffs would encounter the question whether the letter contained an absolute offer or only invited one, and, if the former, whether the offer had not been rejected by the modified offer in the first telegram mentioned. However this may be, the parties did not stop at the point which we have reached, but went on telegraphing as we shall state; so that, if there was any moment when a contract had been made, the parties assumed the contrary, and continued their bargaining. Either no contract had been made thus far, or it was discharged by the conduct of the parties. It was treated as discharged in a letter of the plaintiffs' agents written later on the same day.

We come, then, to the later telegrams of the same day, which are relied on as making the second contract. At half past eleven the defendants telegraphed, "Subject prompt reply, will let you May space, fifty-two six." This was received in New York at sixteen minutes past twelve, and at twenty-eight minutes past twelve a reply was sent accepting the offer. For some reason this was not received by the defendants until twenty minutes past one. At one the defendants telegraphed, revoking their offer, the message being received in New York at forty-three minutes past one. The plaintiffs held the defendants to their bargain, and both parties stand upon their rights.

There is no doubt that the reply was handed to the telegraph company promptly, and, at least, it would have been open to a jury to find that the plaintiffs had done all that was necessary on their part to complete the contract. If, then, the offer was outstanding when it was accepted, the contract was made. But the offer was outstanding. At the time when the acceptance was received, even the revocation of the offer had not been received. It seems to us a reasonable requirement that, to disable the plaintiffs from accepting their offer, the defendants should bring home to them actual notice that it had been revoked. By their choice and act, they brought about a relation between themselves and the plaintiffs, which the plaintiffs could turn into a contract by an act on their part, and authorized the plaintiffs to understand and to assume that that relation existed. When the plaintiffs acted in good faith on the assumption, the defendants could not complain. Knowingly to lead a person reasonably to suppose that you offer, and to offer, are the same thing. O'Donnell v. Clinton, 145 Mass. 461, 463; Cornish v. Abington, 4 Hurl. & N. 549. The offer must be made before the acceptance, and it does not matter whether it is made a longer or a shorter time before, if, by its express or implied terms, it is outstanding at the time of the acceptance. Whether much or little time has intervened, it reaches forward to the moment of the acceptance, and speaks then. It would be monstrous to allow an in-

consistent act of the offerer, not known or brought to the notice of the offeree, to affect the making of the contract; for instance, a sale by an agent elsewhere one minute after the principal personally has offered goods which are accepted within five minutes by the person to whom he is speaking. The principle is the same when the time is longer, and the act relied on a step looking to, but not yet giving notice. The contrary suggestion by Wilde, J., in McCulloch v. Insurance Co. (1 Pick. 278, 279), is not adopted as a ground of decision, and the view which we take is that taken by the supreme court of the United States, and is now the settled law of England. Tayloe v. Insurance Co., 9 How. 390, 400; Patrick v. Bowman, 149 U. S. 411, 424; Byrne v. Van Tienhoven, 5 C. P. Div. 344; Stevenson v. McLean, 5 Q. B. Div. 346; Henthorn v. Fraser, [1892] 2 Ch. 27; Thomson v. James, 18 Ct. of Sess. Cas. (2d Series) 1; Langdell Cont. § 180; Drew v. Nunn, 4 Q. B. Div. 661, 667; Wheat v. Cross, 31 Md. 99, 103; Kempner v. Cohn, 47 Ark. 519, 527.

It is unnecessary to consider other reasons which were urged for our decision.

Exceptions sustained.

9 Cyc. 297 (82); W. P. 31 (35); 33 (37); 39 (42).

Acceptance of guaranty.

BISHOP *v.* EATON.

161 MASSACHUSETTS, 496.—1894.

Contract, on a guaranty. Judgment for plaintiff. Defendant alleged exceptions.

Defendant wrote plaintiff: "If Harry [defendant's brother] needs more money, let him have it or assist him to get it, and I will see that it is paid." Plaintiff signed the brother's note as surety, relying on defendant's letter. Shortly afterwards plaintiff wrote defendant stating that he had signed the note. He deposited the letter, postage prepaid, in the post office at Sycamore, Illinois, addressed to defendant at the latter's home in Nova Scotia. The letter was never received by defendant. When the note was due it was extended for a year, but whether with defendant's knowledge or consent was in dispute. After it was again due defendant said to plaintiff: "Try to get Harry to pay it. If he don't, I will. It shall not cost you anything." Plaintiff afterward paid the note.

The principal question in the case was whether the plaintiff was bound to notify defendant of the acceptance of the offer, and, if so, whether the due mailing, within a reasonable time, of a letter accepting the offer of guaranty was sufficient, or whether such letter

of notification or acceptance must actually be received. A secondary question was whether the extension of time of payment, without defendant's knowledge or consent, released him from the guaranty, and, if so, whether there was a subsequent waiver or notification.

KNOWLTON, J. The first question in this case is whether the contract proved by the plaintiff is an original and independent contract or a guaranty. The judge found that the plaintiff signed the note relying upon the letter, "and looked to the defendant solely for reimbursement if called upon to pay the note." The promise contained in the letter was in these words: "If Harry needs more money, let him have it, or assist him to get it, and I will see that it is paid." On a reasonable interpretation of this promise, the plaintiff was authorized to adopt the first alternative, and let Harry have the money in such a way that a liability of Harry to him would be created, and to look to the defendant for payment if Harry failed to pay the debt at maturity; or he might adopt the second alternative and assist him to get money from some one else in such a way as to create a debt from Harry to the person furnishing the money, and, if Harry failed to pay, might look to the defendant to relieve him from the liability. The words fairly imply that Harry was to be primarily liable for the debt, either to the plaintiff or to such other person as should furnish the money, and that the defendant was to guarantee the payment of it. We are therefore of opinion, that, if the plaintiff relied solely upon the defendant, he was authorized by the letter to rely upon him only as a guarantor.

The defendant requested many rulings in regard to the law applicable to contracts of guaranty, most of which it becomes necessary to consider. The language relied on was an offer to guarantee, which the plaintiff might or might not accept. Without acceptance of it there was no contract, because the offer was conditional and there was no consideration for the promise. But this was not a proposition which was to become a contract only upon the giving of a promise for the promise, and it was not necessary that the plaintiff should accept it in words, or promise to do anything before acting upon it. It was an offer which was to become effective as a contract upon the doing of the act referred to. It was an offer to be bound in consideration of an act to be done, and in such a case the doing of the act constitutes the acceptance of the offer and furnishes the consideration. Ordinarily there is no occasion to notify the offerer of the acceptance of such an offer, for the doing of the act is a sufficient acceptance, and the promisor knows that he is bound when he sees that action has been taken on the faith of his offer. But if the act is of such a kind that knowledge of it will not quickly come to the promisor, the promisee is bound to give him notice of his acceptance within a reasonable time after doing that which con-

stitutes the acceptance. In such a case it is implied in the offer that, to complete the contract, notice shall be given with due diligence, so that the promisor may know that a contract has been made. But where the promise is in consideration of an act to be done, it becomes binding upon the doing of the act so far that the promisee cannot be affected by a subsequent withdrawal of it, if within a reasonable time afterward he notifies the promisor. In accordance with these principles, it has been held in cases like the present, where the guarantor would not know of himself, from the nature of the transaction, whether the offer has been accepted or not, that he is not bound without notice of the acceptance, seasonably given after the performance which constitutes the consideration. Babcock v. Bryant, 12 Pick. 133; Whiting v. Stacy, 15 Gray, 270; Schlessinger v. Dickinson, 5 Allen, 47.

In the present case the plaintiff seasonably mailed a letter to the defendant, informing him of what he had done in compliance with the defendant's request, but the defendant testified that he never received it, and there is no finding that it ever reached him. The judge ruled, as matter of law, that upon the facts found, the plaintiff was entitled to recover, and the question is thus presented whether the defendant was bound by the acceptance when the letter was properly mailed, although he never received it.

When an offer of guaranty of this kind is made, the implication is that notice of the act which constitutes an acceptance of it shall be given in a reasonable way. What kind of a notice is required depends upon the nature of the transaction, the situation of the parties, and the inferences fairly to be drawn from their previous dealings, if any, in regard to the matter. If they are so situated that communication by letter is naturally to be expected, then the deposit of a letter in the mail is all that is necessary. If that is done which is fairly to be contemplated from their relations to the subject-matter and from their course of dealing, the rights of the parties are fixed, and a failure actually to receive the notice will not affect the obligation of the guarantor.

The plaintiff in the case now before us resided in Illinois and the defendant in Nova Scotia. The offer was made by letter, and the defendant must have contemplated that information in regard to the plaintiff's acceptance or rejection of it would be by letter. It would be a harsh rule which would subject the plaintiff to the risk of the defendant's failure to receive the letter giving notice of his action on the faith of the offer. We are of opinion that the plaintiff, after assisting Harry to get the money, did all that he was required to do when he seasonably sent the defendant the letter by mail informing him of what had been done.

How far such considerations are applicable to the case of an ordi-

nary contract made by letter, about which some of the early decisions are conflicting, we need not now consider.[1]

The plaintiff was not called upon under his contract to attempt to collect the money from the maker of the note, and it is no defense that he did not promptly notify the defendant of the maker's default, at least in the absence of evidence that the defendant was injured by the delay. This rule in cases like the present was established in Massachusetts in Vinal v. Richardson (13 Allen, 521), after much consideration, and it is well founded in principle and strongly supported by authority.

We find one error in the rulings which requires us to grant a new trial. It appears from the bill of exceptions that when the note became due the time for the payment of it was extended without the consent of the defendant. The defendant is thereby discharged from his liability, unless he subsequently assented to the extension and ratified it. Chace v. Brooks, 5 Cush. 43; Carkin v. Savory, 14 Gray, 528. The court should therefore have ruled substantially in accordance with the defendant's eighth request, instead of finding for the plaintiff, as matter of law, on the facts reported. Whether the judge would have found a ratification on the evidence if he had considered it, we have no means of knowing.

Exceptions sustained.

20 Cyc. 1404–1410 (48–73); 16 L. R. A. (N. S.) 353; 20 H. L. R. 485; 11 C. L. R. 178; Ames, Cases on suretyship, notes pp. 225–237; Rogers, Notice of acceptance in contracts of guaranty, 5 C. L. R. 215.

DAVIS SEWING MACHINE COMPANY *v.* RICHARDS AND ANOTHER

115 UNITED STATES, 524.—1885.

This was an action brought in the Supreme Court of the District of Columbia, upon a guaranty of the performance by one John W. Poler of a contract under seal, dated December 17th, 1872, between him and the plaintiff corporation, by which it was agreed that all sales of sewing machines which the corporation should make to him should be upon certain terms and conditions, the principal of which were that Poler should use all reasonable efforts to introduce, supply, and sell the machines of the corporation, at not less than its regular retail prices, throughout the District of Columbia and the counties of Prince George and Montgomery in the State of Maryland, and should pay all indebtedness by account, note, indorsement

[1] See Brauer v. Shaw, 168 Mass. 198, *ante*, p. 27.

or otherwise, which should arise from him to the corporation under the contract, and should not engage in the sale of sewing machines of any other manufacture; and that the corporation, during the continuance of the agency, should sell its machines to him at a certain discount, and receive payment therefor in certain manner; and that either party might terminate the agency at pleasure.

The guaranty was upon the same paper with the above contract, and was as follows:

"For value received, we hereby guarantee to the Davis Sewing Machine Company of Watertown, N. Y., the full performance of the foregoing contract on the part of John W. Poler, and the payment by said John W. Poler of all indebtedness, by account, note, indorsement of notes (including renewals and extensions) or otherwise, to the said Davis Sewing Machine Company, for property sold to said John W. Poler, under this contract, to the amount of three thousand ($3000) dollars. Dated Washington, D. C., December 17th, 1872.

"A. ROTHWELL.
"A. C. RICHARDS."

Under the guaranty were these words: "I consider the above sureties entirely responsible. Washington, December 19th, 1872.

"J. T. STEVENS."

At the trial the above papers, signed by the parties, were given in evidence by the plaintiff, and there was proof of the following facts: On December 17th, 1872, at Washington, the contract was executed by Poler, and the guaranty was signed by the defendants, and the contract and guaranty, after being so signed, were delivered by the defendants to Poler, and by Poler to Stevens, the plaintiff's attorney, and by Stevens afterward forwarded, with his recommendation of the sureties, to the plaintiff at Watertown, in the State of New York, and the contract there executed by the plaintiff. The plaintiff afterward delivered goods to Poler under the contract, and he did not pay for them. The defendants had no notice of the plaintiff's execution of the contract or acceptance of the guaranty, and no notice or knowledge that the plaintiff had furnished any goods to Poler under the contract or upon the faith of the guaranty, until January, 1875, when payment therefor was demanded by the plaintiff of the defendants, and refused. At the time of the signing of the guaranty, the plaintiff had furnished no goods to Poler, and the negotiations then pending between the plaintiff and Poler related to prospective transactions between them.

The Court instructed the jury as follows: "It appearing that, at the time the defendants signed the guaranty on the back of the contract between the plaintiff and Poler, the plaintiff had not executed the contract or assented thereto, and that the contract and guaranty related to prospective dealings between the plaintiff and

Poler, and that subsequently to the signing thereof by the defendants the attorney for the plaintiff approved the responsibility of the guarantors and sent the contract to Watertown, N. Y., to the plaintiff, which subsequently signed it, and no notice having been given by the plaintiff to the defendants of the acceptance of such contract and guaranty, and that it intended to furnish goods thereon and hold the defendants responsible, the plaintiff cannot recover, and the jury should find for the defendants."

A verdict was returned for the defendants, and judgment rendered thereon, which on exceptions by the plaintiff was affirmed at the general term, and the plaintiff sued out this writ of error, pending which one of the defendants died and his executor was summoned in.

GRAY, J., delivered the opinion of the Court. After stating the facts in the language above reported, he continued:

The decision of this case depends upon the application of the rules of law stated in the opinion in the recent case of Davis v. Wells, 104 U. S. 159, in which the earlier decisions of this Court upon the subject are reviewed.

Those rules may be summed up as follows: A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is signed by the guarantor at the request of the other party, or if the latter's agreement to accept is contemporaneous with the guaranty, or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract. But if the guaranty is signed by the guarantor without any previous request of the other party, and in his absence, for no consideration moving between them except future advances to be made to the principal debtor, the guaranty is in legal effect an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract.

The case at bar belongs to the latter class. There is no evidence of any request from the plaintiff corporation to the guarantors, or of any consideration moving from it and received or acknowledged by them at the time of their signing the guaranty. The general words at the beginning of the guaranty, "value received," without stating from whom, are quite as consistent with a consideration received by the guarantors from the principal debtor only. The certificate of the sufficiency of the guarantors, written by the plaintiff's attorney under the guaranty, bears date two days later than the guaranty itself. The plaintiff's original contract with the principal debtor was not executed by the plaintiff until after that. The guarantors had no notice that their sufficiency had been approved, or that their guaranty had been accepted, or even that the original contract

had been executed or assented to by the plaintiff, until long afterward, when payment was demanded of them for goods supplied by the plaintiff to the principal debtor.

Judgment affirmed.[1]

Offer creates no legal rights until acceptance, but may lapse or be revoked.

(*i.*) *Lapse.*

a. Lapse by death.

PRATT *v.* TRUSTEES.

93 ILLINOIS, 475.—1879.

Action on notes. Plaintiff had judgment below.

SCHOLFIELD, J. Appellees obtained judgment in the county court of Kane County against Mary L. Pratt, as administratrix of the estate of Philemon B. Pratt, deceased, on two promissory notes, executed by the deceased to the appellees on the 6th of July, 1871, —one for $300, payable one year after date, and the other for the sum of $327.50, payable two years after date, and both bearing interest at the rate of ten per cent per annum. Appeal was taken from that judgment to the Circuit Court of Kane County, where the cause

[1] In Evans v. McCormick, 167 Pa. St. 247, the court says: "It is contended by counsel, however, that 'if the guaranty is made at the request of the guarantee it then becomes the answer of the guarantor to a proposal made to him, and its delivery to and for the use of the guarantee completes the communication between them and constitutes a contract.' As authority for this position Davis v. Wells, 104 U. S. 159, and Sewing Machine Co. v. Richards, 115 U. S. 524, are cited. These cases do so hold although the decisions turned on other points. Looking to our own decisions, we find a different doctrine held in Kay v. Allen, 9 Pa. 320; it was argued by counsel, 'that a precedent request by the creditor to the party subsequently offering the guaranty was equivalent to notice of acceptance.' Mr. Justice Bell delivering the opinion of the court could find no warrant for any such view. In rejecting the proposition he reasons as follows: 'Indeed it is difficult to imagine how precedent request alone can supply the place of subsequent notice, since after request made and proffer of guaranty, the merchant may refuse the credit or advance craved, and without notice the surety cannot know whether he has or has not. So far is this insisted on, that it is said without notice there can be no contract; for like all other contracts, that of guaranty requires both a proposal and acceptance thereof.' This doctrine was distinctly recognized and reaffirmed in Gardner v. Lloyd [110 Pa. St. 278] decided since the case in 104 U. S., Mr. Justice Green quoting the very language of Judge Bell. The reasoning of the Supreme Court of this State is convincing while for the doctrine of the United States Court no reason is offered, and we feel bound to follow the decisions of our own courts."

was again tried at its October term, 1876, resulting, as before, in a judgment in favor of appellees for the amount of the notes, principal and interest. Mary L. Pratt, administratrix, appeals from that judgment, and brings the rulings of the Circuit Court before us for review.

The defense interposed to the notes is, that they were executed without any valid consideration. . . .

The question to be considered is, did Pratt's death revoke the promise expressed in the notes, no money having been expended, or labor bestowed, or liability of any kind incurred, prior to his death, upon the faith of that promise?

The purpose in giving the notes was to enable the church represented by appellees to purchase a bell. The cost of a bell of a particular size, etc., was estimated by Pratt, and he gave his notes for the amount of the estimate, intending that when the notes were paid the money should be devoted to paying for such a bell; and when the notes matured, at Pratt's suggestion to let them stand, because, as he alleged, bell metal was getting cheaper, and they would thereby be enabled to procure a larger bell, no effort was made to collect the notes, and they were permitted to remain just as they were; but there was no undertaking on the part of appellees nor the church which they represent to procure a bell, and there is no proof of any act done, or liability incurred by appellees, or any one else, in reliance upon these notes, before the death of Pratt. It is shown that the bell has been procured, and probably there is evidence sufficient to show that this has been done on the faith of those notes, but it appears with a reasonable certainty that this has been since Pratt's death. If a contract therefor was made in Pratt's life-time, the record unfortunately does not show it. Collection of the notes cannot be enforced as a promise to make a gift. Pope v. Dodson, 58 Ill. 360; Blanchard v. Williamson, 70 Id. 652. Where notes are given by way of voluntary subscription, to raise a fund or promote an object, they are open to the defense of a want of consideration, unless money has been expended, or liabilities incurred, which, by a legal necessity, must cause loss or injury to the person so expending money, or incurring liability, if the notes are not paid. 1 Pars. on Bills and Notes, 202; 1 Pars. on Cont. 377, *et seq.*

And so it has been held that the payee of a promissory note given to him in the expectation of his performing service, but without any contract binding him to serve, cannot maintain an action upon it. Hulse v. Hulse, 17 C. B. 711; 84 Eng. Com. Law, 709.

In the absence of any one claiming rights as a *bona fide* assignee before maturity, it is not perceived that promissory notes, executed as these were, are, in any material respect, different from an ordinary subscription whereby the subscriber agrees under his hand, to pay so

much in aid of a church, school, etc., where there is no corresponding undertaking by the payee.

The promise stands as a mere offer, and may, by necessary consequence, be revoked any time before it is acted upon. It is the expending of money, etc., or incurring of legal liability, on the faith of the promise, which gives the right of action, and without this there is no right of action. McClure v. Wilson, 43 Ill. 356, and cases there cited; Trustees v. Garvey; 53 Id. 401; S. C., 5 Am. Rep. 51; Baptist Education Soc. v. Carter, 72 Id. 247.

Being but an offer, and susceptible of revocation at any time before being acted upon, it must follow that the death of the promisor, before the offer is acted upon, is a revocation of the offer. This is clearly so upon principle. The subscription or note is held to be a mere offer until acted upon, because until then there is no mutuality. The continuance of an offer is in the nature of its constant repetition, which necessarily requires some one capable of making a repetition. Obviously this can no more be done by a dead man than a contract can, in the first instance, be made by a dead man.

If the payees named in the notes may be held agents of the promisor, with power to contract for work to be done and money expended upon the faith of the notes, the case of Campanari v. Woodburn (15 C. B. 400; 80 Eng. Com. Law, 400) is directly in point, and holds that the death of the promisor was a revocation of the agency. In that case the plaintiff alleged that it was agreed between him and the defendant's intestate that he should endeavor to sell a certain picture, and that if he succeeded the intestate should pay him 100 pounds; that he did so endeavor while the testator was alive, and through the efforts then made was enabled to effect a sale after the testator's death, but that the defendant had refused to pay 100 pounds. The count was held not to show a cause of action. Jervis, C. J., said that if the testator had countermanded the sale, he clearly would not have been liable for commissions, although the plaintiff might have recovered for services already rendered and charges and expenses previously incurred. *A fortiori* the defendant was not responsible when the revocation proceeded from the act of God.

An analogous case is Michigan State Bank v. Leavenworth (2 Williams [Vt.], 209), where it was held that the operation of a letter of credit was confined to the life of the writer, and that no recovery can be had upon it for goods sold or advances made after his death.

The question that has been raised, in some cases, whether a party acting in good faith upon the belief that the principal is alive, may recover, does not arise here, as there is nothing in the evidence to authorize the inference that the bell here was purchased under the belief that Pratt was still alive.

We are of the opinion, on the record before us, the judgment below

was unauthorized. It must therefore be reversed and the cause remanded.

Judgment reversed.[1]

9 Cyc. 293 (48–50); W. P. 42 (44); 186 (3).

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b. Lapse by failure to accept in manner prescribed.

ELIASON *et al. v.* HENSHAW.

4 WHEATON (U. S.), 225.—1819.

Error to the Circuit Court for the District of Columbia.

WASHINGTON, J. This is an action, brought by the defendant in error, to recover damages for the non-performance of an agreement, alleged to have been entered into by the plaintiffs in error, for the purchase of a quantity of flour, at a stipulated price. The evidence of this contract, given in the court below, is stated in a bill of exceptions, and is to the following effect:

A letter from the plaintiffs to the defendant, dated the 10th of February, 1813, in which they say: "Capt. Conn informs us that you have a quantity of flour to dispose of. We are in the practice of purchasing flour at all times, in Georgetown, and will be glad to serve you, either in receiving your flour in store, when the markets are dull, and disposing of it, when the markets will answer to advantage, or we will purchase at market price, when delivered; if you are disposed to engage two or three hundred barrels at present, we will give you $9.50 per barrel, deliverable the first water, in Georgetown, or any service we can. If you should want an advance, please write us by mail, and will send you part of the money in advance." In a postscript they add, " Please write by return of wagon, whether you

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[1] For a similar case of revocation by insanity, see Beach v. First M. E. Church, 96 Ill. 177.

In Jordan v. Dobbins, 122 Mass. 168, an action upon a guaranty for a proposed sale of goods to a third person, the court said: "The guaranty is carefully drawn, but it is in its nature nothing more than a simple guaranty for a proposed sale of goods. The provision, that it shall continue until written notice is given by the guarantor that it shall not apply to future purchases, affects the mode in which the guarantor might exercise his right to revoke it, but it cannot prevent its revocation by his death. The fact that the instrument is under seal cannot change its nature or construction. No liability existed under it against the guarantor at the time of his death, but the goods for which the plaintiffs seek to recover were all sold afterward.

"We are not impressed by the plaintiff's argument that it is inequitable to throw the loss upon them. It is no hardship to require traders, whose business it is to deal in goods, to exercise diligence so far as to ascertain whether a person upon whose credit they are selling is living."

accept our offer." This letter was sent from the house at which the writer then was, about two miles from Harper's Ferry, to the defendant, at his mill, at Mill Creek, distant about twenty miles from Harper's Ferry, by a wagoner then employed by the defendant to haul flour from his mill to Harper's Ferry, and then about to return home with his wagon. He delivered the letter to the defendant, on the 14th of the same month, to which an answer, dated the succeeding day, was written by the defendant, addressed to the plaintiffs, at Georgetown, and dispatched by a mail which left Mill Creek on the 19th, being the first regular mail from that place to Georgetown. In this letter the writer says: "Your favor of the 10th inst. was handed me by Mr. Chenoweth last evening. I take the earliest opportunity to answer it by post. Your proposal to engage 300 barrels of flour, delivered in Georgetown, by the first water, at $9.50 per barrel, I accept; shall send on the flour by the first boats that pass down from where my flour is stored on the river; as to any advance, will be unnecessary—payment on delivery is all that is required."

On the 25th of the same month, the plaintiffs addressed to the defendant an answer to the above, dated at Georgetown, in which they acknowledge the receipt of it, and add: "Not having heard from you before, had quite given over the expectation of getting your flour; more particularly, as we requested an answer by return of wagon the next day, and as we did not get it, had bought all we wanted." The wagoner, by whom the plaintiffs' first letter was sent, informed them, when he received it, that he should not probably return to Harper's Ferry, and he did not, in fact, return in the defendant's employ. The flour was sent down to Georgetown some time in March, and the delivery of it to the plaintiffs was regularly tendered and refused.

Upon this evidence, the defendants in the court below, the plaintiffs in error, moved that court to instruct the jury, that if they believed the said evidence to be true, as stated, the plaintiff in this action was not entitled to recover the amount of the price of the 300 barrels of flour, at the rate of $9.50 per barrel. The court being divided in opinion, the instruction prayed for was not given. The question is, whether the court below ought to have given the instruction to the jury, as the same was prayed for? If they ought, the judgment, which was in favor of the plaintiff in that court, must be reversed.

It is an undeniable principle of the law of contracts, that an offer of a bargain by one person to another, imposes no obligation upon the former until it is accepted by the latter, according to the terms in which the offer was made. Any qualification of, or departure from, those terms invalidates the offer, unless the same be agreed to by the person who made it. Until the terms of the agreement have received

the assent of both parties, the negotiation is open, and imposes no obligation upon either.

In this case, the plaintiffs in error offered to purchase from the defendant two or three hundred barrels of flour, to be delivered at Georgetown, by the first water, and to pay for the same $9.50 per barrel. To the letter containing this offer, they required an answer by the return of the wagon, by which the letter was dispatched. This wagon was at that time in the service of the defendant, and employed by him in hauling flour from his mill to Harper's Ferry, near to which place the plaintiffs then were. The meaning of the writers was obvious. They could easily calculate, by the usual length of time which was employed by this wagon in traveling from Harper's Ferry to Mill Creek and back again with a load of flour, about what time they should receive the desired answer, and therefore it was entirely unimportant whether it was sent by that or another wagon, or in any other manner, provided it was sent to Harper's Ferry, and was not delayed beyond the time which was ordinarily employed by wagons engaged in hauling flour from the defendant's mill to Harper's Ferry. Whatever uncertainty there might have been as to the time when the answer would be received, there was none as to the place to which it was to be sent; this was distinctly indicated by the mode pointed out for the conveyance of the answer. The place, therefore, to which the answer was to be sent, constituted an essential part of the plaintiff's offer.

It appears, however, from the bill of exceptions, that no answer to this letter was at any time sent to the plaintiff's at Harper's Ferry. Their offer, it is true, was accepted by the terms of a letter addressed Georgetown, and received by the plaintiffs at that place; but an acceptance communicated at a place different from that pointed out by the plaintiffs, and forming a part of their proposal, imposed no obligation binding upon them, unless they had acquiesced in it, which they declined doing. It is no argument, that an answer was received at Georgetown; the plaintiffs in error had a right to dictate the terms upon which they would purchase the flour, and unless they were complied with, they were not bound by them. All their arrangements may have been made with a view to the circumstance of place, and they were the only judges of its importance. There was, therefore, no contract concluded between these parties, and the court ought, therefore, to have given the instruction to the jury, which was asked for.

Judgment reversed, and cause remanded, with directions to award *a venire facias de novo.*

9 Cyc. 266 (29-31); W. P. 43 (47).

c. Lapse by expiration of time.

MACLAY *v.* HARVEY.

90 ILLINOIS, 525.—1878.

SCHOLFIELD, J. Appellant brought assumpsit against appellee in the court below, on an alleged contract whereby the latter employed the former to take charge of the millinery department of his store in Monmouth, in this State, for the season commencing in April and ending in July, in the year 1876, and to pay her therefor $15 per week.

The judgment was in favor of the appellee, and appellant now assigns numerous errors as grounds for its reversal.

In our opinion, the case may be properly disposed of by the consideration of a single question. Appellant's right of recovery is based entirely upon an alleged special contract, and unless there was such a contract the judgment below is right, however erroneous may have been the rulings under which it was obtained.

After some preliminary correspondence, which is not before us, appellant, who was then residing in Peoria, received from appellee the following, by mail:

"MONMOUTH, ILL., March 9, 1876.

"*Miss L. Maclay, Peoria, Ill.:* I have been trying to find your address for some time, and was informed last evening that you were in Peoria. I write to inquire if you intend to work at millinery this season, and if you have made any arrangements or not. If you have not, can you take charge of my stock this season? And if we can agree, I would want you for a permanent trimmer.

"Please notify me by return mail, and terms, and we can confer further.

"Yours in haste,

"JOHN HARVEY."

"Formerly Jno. Harvey & Co., when you trimmed for me."

Appellant's reply to this is not before us. She says she stated her terms in it, and thereafter appellee wrote her the following, which she also received by mail:

"MONMOUTH, ILL., March 21, 1876.

"*Miss L. Maclay, Peoria, Ill.:* Your favor was received in due time, and contents noted. You spoke of wages at $15 per week, and fare one way. You will want to go to Chicago, I presume, and trim a week or ten days.

"I would like for you to trim at H. W. Wetherell's or at Keith Bros. I will give you $15 per week and pay your fare from Chicago to Monmouth, and pay you the above wages for your actual time here in the house at that rate per season.

"I presume that the wholesale men will allow you for your time in the house. You will confer a favor by giving me your answer by return mail.

"Yours,

"JOHN HARVEY."

Appellant says she received this in the afternoon, and replied the next day by postal card addressed to appellee, at Monmouth, as follows:

"PEORIA, March 23.

"*Mr. Harvey:* Yours was promptly received, and I will go up to Chicago next week, and when my services are required you will let me know.

"Very respectfully,

"L. MACLAY."

Appellant did not place this in the post-office herself, but she says she gave it to a boy who did errands about the house of her sister, with whom she was then staying, directing him to place it in the office. The postmark on the card, which is shown to be always placed on mail matter the same day it is put in the office, shows that the card was not mailed until the 25th of March.

Appellee receiving no reply from appellant, on Monday morning, March 27, went to Peoria and endeavored to engage another milliner, and failing in this, endeavored to find appellant, but was unable to do so, and then returned to Monmouth, when he received the appellant's postal card, which had come to the office there during his absence. On Wednesday night of the same week appellee left Monmouth for Chicago, arriving at the last-named place on the following Thursday, March 30. Finding that the appellant was neither at Keith Bros. nor at Wetherell's, he proceeded to employ another milliner, and on the same day, and before leaving Chicago, wrote and mailed a letter directed to appellant's address at Peoria, notifying her of that fact, but this letter, in consequence of appellant's absence from Peoria, she did not receive for some time afterward.

The millinery season commences from the 5th to the 10th of April and ends from the 20th of June to the 4th of July, as shown by the evidence. Appellee had not laid in his spring stock when he was corresponding with appellant, and he started to New York, from Chicago, for that purpose, on the evening of the day on which he addressed the letter to appellant notifying appellant of his employment of another milliner, the evening of the 30th of March. Appellant says she left Peoria for Chicago on Friday, which must have been the 31st of March. On arriving at Chicago she went to Wetherell's, and failing to get employment there, did not go to Keith Bros., but went to another house in the same line of business, where she remained some days, and on the 8th of April she notified appellee, by letter, that she was sufficiently informed as to the "new ideas of trimming" and was ready to enter his service. Appellee replied to this, reciting the disappointments he claimed to have met with on her account, and again notifying her that he did not require her services.

If a contract was consummated between the parties, it was by the

mailing of appellant's postal card on the 25th of March. Appellee's letter of the 21st cannot be regarded as the consummation of a contract, because it restates the terms with some variation, though it may be but slight, and requires an acceptance upon the terms thus stated. This, until unequivocally accepted, was only a mere proposition or offer. Hough v. Brown, 19 N. Y. 111.

It was said by the Lord Chancellor in Dunlop v. Higgins (1 H. L. Cas. 387):

"Where an individual makes an offer by post, stipulating for, or by the nature of the business having the right to expect, an answer by return of post, the offer can only endure for a limited time, and the making of it is accompanied by an implied stipulation that the answer shall be sent by return of post. If that implied stipulation is not satisfied, the person making the offer is released from it. When a person seeks to acquire a right, he is bound to act with a degree of strictness, such as may not be required where he is only endeavoring to excuse himself from a liability."

This is regarded as a leading case on the question of acceptance of contract by letter, and the language quoted we regard as a clear and accurate statement of the law, as applicable to the present case. It is clear here that the nature of the business demanded a prompt answer, and the words, "you will confer a favor by giving me your answer by return mail," do, in effect, "stipulate" for an answer by return mail. Taylor v. Rennie, 35 Barb. 272. The evidence shows that there were two daily mails between Peoria and Monmouth, one arriving at Monmouth at 11 o'clock A. M., and the other at 6 o'clock P. M., and it did not require more than one day's time between the points. Appellee's letter to appellant making the offers, it will be remembered, bears date March 21st. Assuming the date of the appellant's postal card (which, she says, was written on the morning after she received appellee's letter) to be correct, she received appellant's letter on the evening of the 22d. Appellee was, therefore, entitled to expect a reply mailed on the 23d, which he ought to have received on that day, or at farthest, by the morning of the 24th; but appellant's reply was not mailed until the 25th. It does not relieve appellant of fault that she gave the postal card to a boy on the 23d, to have him mail it. Her duty was not to place an answer in private hands, but in the post-office. The boy was her agent, not that of the appellee, and his negligence in mailing the postal card was her negligence.

The question whether it would not have equally subserved appellee's object had he treated the postal card of appellant as the consummation of a contract is irrelevant. Appellant seeks to recover upon the strict letter of a special contract, and it is therefore incumbent upon her to prove such contract. It is required of her, as we have seen, to prove an acceptance of appellee's offer within the time to which

it was limited—that is to say, by the placing in the post-office of an answer unequivocally accepting the offer in time for the return mail, which she did not do. Appellee was therefore under no obligation to regard the contract as closed. He might, it is true, have done so, but he was not legally bound in that respect, nor was he legally bound to notify appellant that her acceptance had not been signified within the time to which his offer was limited. She is legally chargeable with knowledge that her acceptance was not in time, and in order to fix a liability thereby upon the appellee, it was incumbent upon her, before assuming that appellee waived this objection, to ascertain that he in fact did so.

Appellee was led by the postal card of appellant to believe that he would, when he arrived at Chicago on Thursday, find her either at Wetherell's or at Keith Bros. Had he done so, it was his intention to treat the contract as closed; but she was not there, and this intention was not acted upon, and so it is to be considered as if it had never existed. Appellee, not finding appellant at Wetherell's or Keith Bros., as she had led him to believe he would, had no reason to assume that she was, in good faith, acting upon the assumption that her postal card had closed the contract, and he cannot therefore be held estopped from denying that it was not posted in time. In view of the lateness of the season and the danger to appellee's business from delay, of all which appellant was aware, it cannot be said appellee acted with undue haste in engaging another milliner. The judgment is affirmed.

Judgment affirmed.[1]

DICKEY, J., dissented.

9 Cyc. 265–266 (23–24); 291 (37); W. P. 29 (31).

[1] In Ferrier v. Storer, 63 Iowa, 484, the court said: "We have to inquire whether an acceptance after the time limited, or, in the absence of an express limitation, after the lapse of a reasonable time, imposes on the person making the offer any obligation. The theory of the court below seems to have been that it does. But in our opinion it does not. The offer, unless sooner withdrawn, stands during the time limited, or, if there is no express limitation, during a reasonable time. Until the end of that time the offer is regarded as being constantly repeated. Chitty on Cont. (11th ed.), 17. After that there is no offer, and properly considered, nothing to withdraw. The time having expired, there is nothing which the acceptor can do to revive the offer, or produce an extension of time." But in Phillips v. Moore, 71 Me. 78 it was held: "It is true that an offer, to be binding upon the party making it, must be accepted within a reasonable time, Peru v. Turner, 10 Maine, 185; but if the party to whom it is made, makes known his acceptance of it to the party making it, within any period which he could fairly have supposed to be reasonable, good faith requires the maker, if he intends to retract on account of the delay, to make known that intention promptly. If he does not, he must be regarded as waiving any objection to the acceptance as being too late."

MINNESOTA OIL CO. *v.* COLLIER &c. CO.

4 DILLON (U. S. C. C.), 431.—1876.

Action for oil sold by plaintiff to defendant. Defendant sets up counter-claim for damages for non-delivery of oil bought of plaintiff.

Defendant's counter-claim rests on these facts. On July 31st, plaintiff offered defendant by telegraph a quantity of oil at fifty-eight cents. The telegram was sent on Saturday, but was not delivered to defendant until Monday, August 2d, between eight and nine o'clock. On Tuesday, August 3d, about nine o'clock, defendant deposited a telegram accepting the offer. Later in the day, plaintiff sent defendant a telegram withdrawing the offer of July 31st, but defendant replied that sale was effected, and inquired when shipment would follow.

It appeared that the market was very much unsettled, and that the price of oil was subject to sudden fluctuations during the month previous, and at the time of this negotiation, varying from day to day, and ranging between fifty-five and seventy-five cents per gallon.

It is urged by the defendant that the dispatch of Tuesday, August 3, 1875, accepting the offer of the plaintiff transmitted July 31st, and delivered Monday morning, August 2d, concluded a contract for the sale of the twelve thousand four hundred and fifty gallons of oil.

The plaintiff, on the contrary, claims, first, that the dispatch accepting the proposition made July 31st was not received until after the offer had been withdrawn; second, that the acceptance of the offer was not in due time, that the delay was unreasonable, and therefore no contract was completed.

NELSON, J. It is well settled by the authorities in this country, and sustained by the later English decisions, that there is no difference in the rules governing the negotiation of contracts by correspondence through the post-office and by telegraph, and a contract is concluded when an acceptance of a proposition is deposited in the telegraph-office for transmission. See Am. Law Reg. Vol. 14, No. 7, 401, "Contracts by Telegraph," article by Judge Redfield, and authorities cited; also Trevor v. Wood, 36 N. Y. 307.

The reason for this rule is well stated in Adams v. Lindsell (1 Barn. & Ald. 681). The negotiation in that case was by post. The court said, "that if a bargain could not be closed by letter before the answer was received, no contract could be completed through the medium of the post-office; that if the one party was not bound by his offer when it was accepted (that is, at the time the letter of acceptance is deposited in the mail), then the other party ought not to be bound until after they had received a notification that the answer had been received and assented to, and that it might so go

on *ad infinitum.*" See also 5 Pa. St. 339; 11 N. Y. 441; Mactier v. Frith, 6 Wend. 103; 48 N. H. 14; 8 English Common Bench, 225. In the case at bar the delivery of the message at the telegraph-office signified the acceptance of the offer. If any contract was entered into, the meeting of minds was at 8.53 of the clock on Tuesday morning, August 3d, and the subsequent dispatches are out of the case. 1 Parsons on Contracts, 482, 483.

This rule is not strenuously dissented from on the argument, and it is substantially admitted that the acceptance of an offer by letter or by telegraph completes the contract, when such acceptance is put in the proper and usual way of being communicated by the agency employed to carry it; and that when an offer is made by telegraph, an acceptance by telegraph takes effect when the dispatch containing the acceptance is deposited for transmission in the telegraph-office, and not when it is received by the other party. Conceding this, there remains only one question to decide, which will determine the issues: Was the acceptance of defendant deposited in the telegraph-office Tuesday, August 3d, within a reasonable time, so as to consummate a contract binding upon the plaintiff?

It is undoubtedly the rule that when a proposition is made under the circumstances in this case, an acceptance concludes the contract if the offer is still open, and the mutual consent necessary to convert the offer of one party into a binding contract by the acceptance of the other is established if such acceptance is within a reasonable time after the offer was received.

The better opinion is, that what is, or is not, a reasonable time, must depend upon the circumstances attending the negotiation, and the character of the subject-matter of the contract, and in no better way can the intention of the parties be determined. If the negotiation is in respect to an article stable in price, there is not so much reason for an immediate acceptance of the offer, and the same rule would not apply as in a case where the negotiation related to an article subject to sudden and great fluctuations in the market.

The rule in regard to the length of the time an offer shall continue, and when an acceptance completes the contract, is laid down in Parsons on Contracts (Vol. 1, p. 482). He says: "It may be said that whether the offer be made for a time certain or not, the intention or understanding of the parties is to govern. If no definite time is stated, then the inquiry as to a reasonable time resolves itself into an inquiry as to what time it is rational to suppose the parties contemplated; and the law will decide this to be that time which, as rational men, they ought to have understood each other to have had in mind." Applying this rule, it seems clear that the intention of the plaintiff, in making the offer by telegraph, to sell an article which fluctuates so much in price, must have been upon the understanding

that the acceptance, if at all, should be immediate, and as soon after the receipt of the offer as would give a fair opportunity for consideration. The delay here was too long, and manifestly unjust to the plaintiff, for it afforded the defendant an opportunity to take advantage of a change in the market, and accept or refuse the offer as would best subserve its interests.

Judgment will be entered in favor of the plaintiff for the amount claimed. The counter-claim is denied.

Judgment accordingly.

9 Cyc. 291–293 (38–47); W. P. 30 (33); 39 (42).

(*ii.*) *Revocation.*

a. An offer may be revoked at any time before acceptance.

FISHER *v.* SELTZER.

23 PENNSYLVANIA STATE, 308.—1854.

Action by Fisher, late sheriff, to recover from Seltzer the difference between the amount bid at a sale of property and the amount realized at a second sale, with costs, etc. The sheriff, before the sale, had prescribed certain rules or conditions, among which were that "no person shall retract his or her bid," and that if a bidder failed to comply with all conditions of the sale, "he shall pay all costs and charges." At the sale Seltzer bid seven thousand dollars, under the belief that the property was to be sold free of a certain mortgage for six thousand dollars. Discovering his error, he retracted his bid before it was accepted, but the sheriff, denying this right of retraction, knocked down the property to him. He refused to take it. On a resale it brought only one thousand five hundred dollars. Judgment was entered for plaintiff for the costs of the second sale only. Plaintiff prosecuted a writ of error.

By court, LEWIS, J. Mutuality is so essential to the validity of contracts not under seal, that they cannot exist without it. A bid at auction, before the hammer falls, is like an offer before acceptance. In such a case there is no contract, and the bid may be withdrawn without liability or injury to any one. The brief interval between the bid and its acceptance is the reasonable time which the law allows for inquiry, consideration, correction of mistakes, and retraction. This privilege is of vital importance in sheriffs' sales, where the rule of *caveat emptor* operates with all its vigor. It is necessary, in order that bidders may not be entrapped into liabilities never intended. Without it, prudent persons would be discouraged from attending these sales. It is the policy of the law to promote competition, and

thus to produce the highest and best price which can be obtained. The interests of debtors and creditors are thus promoted. By the opposite course, a creditor might occasionally gain an advantage, but an innocent man would suffer unjustly, and the general result would be disastrous. A bidder at sheriff's sale has a right to withdraw his bid at any time before the property is struck down to him, and the sheriff has no authority to prescribe conditions which deprive him of that right. Where the bid is thus withdrawn before acceptance, there is no contract, and such a bidder cannot, in any sense, be regarded as a "purchaser." He is, therefore, not liable for "the costs and charges" of a second sale. Where there has been no sale, there can be no resale.

The judgment ought not to have been in favor of the plaintiff, even for "the costs and charges" of the second sale; but as the defendant does not complain, we do not disturb it.

Judgment affirmed.[1]

9 Cyc. 284–285 (5–8); W. P. 15 (14).

BOSTON & MAINE RAILROAD *v.* BARTLETT AND ANOTHER.

3 CUSHING (MASS.) 224.—1849.

Bill in equity for the specific performance of a contract in writing.

The plaintiffs alleged that the defendants on April 1st, 1844, being the owners of certain land situated in Boston, and particularly described in the bill, "in consideration that said corporation would take into consideration the expediency of buying said land for their use as a corporation, signed a certain writing, dated April 1st, 1844," whereby they agreed to convey to the plaintiffs "the said lot of land,

[1] As to the right of an auctioneer to refuse to accept a bid see Taylor v. Hartnett, 26 Misc. (N. Y.) 362, where the court says: "It is, we think, well settled that he may refuse a hid tendered in bad faith or proffered hy a person who is insolvent or otherwise disabled from completing the purchase; otherwise the whole object of the sale might be defeated. Within the same reasoning comes the right, which we think he possesses, of refusing to accept trifling advances offered by hidders in the course of the sale, especially where that kind of bidding is initiated at the outset and the sum so offered is utterly incommensurate with the actual known value of the property. It is reasonable to infer that bidding of that kind would have a depressing effect on the sale and tend to induce a belief on the part of others in attendance that the value of the property had been approximately reached. We see no reason, then, why it is not within the legitimate bounds of the discretion of the auctioneer to refuse to accept a bid which is little more than a nominal advance, and, considering the surrounding circumstances, is, in his judgment, likely to affect the sale injuriously."

for the sum of $20,000, if the said corporation would take the same within thirty days from that date"; that afterward and within the thirty days, the defendants, at the request of the plaintiffs, "and in consideration that the said corporation agreed to keep in consideration the expediency of taking said land," etc., extended the said term of thirty days, by a writing underneath the written contract above mentioned, for thirty days from the expiration thereof; that, on May 29th, 1844, while the extended contract was in full force, and unrescinded, the plaintiffs elected to take the land on the terms specified in the contract, and notified the defendants of their election, and offered to pay them the agreed price (producing the same in money) for a conveyance of the land, and requested the defendants to execute a conveyance thereof, which the plaintiffs tendered to them for that purpose; and that the defendants refused to execute such conveyance, or to perform the contract, and had ever since neglected and refused to perform the same.

The defendants demurred generally.

FLETCHER, J. In support of the demurrer, in this case, the only ground assumed and insisted on by the defendants is, that the agreement on their part was without consideration, and therefore not obligatory. In the view taken of the case by the court, no importance is attached to the consideration set out in the bill—namely, "that the plaintiffs would take into consideration the expediency of buying the land." The argument for the defendants, that their agreement was not binding, because without consideration, erroneously assumes that the writing executed by the defendants is to be considered as constituting a contract at the time it was made. The decision of the court in Maine in the case of Bean v. Burbank, 4 Shepl. 458, which was referred to for the defendants, seems to rest on the ground assumed by them in this case.

In the present case, though the writing signed by the defendants was but an offer, and an offer which might be revoked, yet while it remained in force and unrevoked, it was a continuing offer during the time limited for acceptance; and, during the whole of that time, it was an offer every instant, but as soon as it was accepted, it ceased to be an offer merely, and then ripened into a contract. The counsel for the defendants is most surely in the right, in saying that the writing when made was without consideration, and did not therefore form a contract. It was then but an offer to contract, and the parties making the offer most undoubtedly might have withdrawn it at any time before acceptance.

But when the offer was accepted, the minds of the parties met, and the contract was complete. There was then the meeting of the minds of the parties, which constitutes and is the definition of a contract. The acceptance by the plaintiffs constituted a sufficient

legal consideration for the engagement on the part of the defendants. There was then nothing wanting, in order to perfect a valid contract on the part of the defendants. It was precisely as if the parties had met at the time of the acceptance, and the offer had then been made and accepted and the bargain completed at once.

A different doctrine, however, prevails in France and Scotland and Holland. It is there held that whenever an offer is made, granting to a party a certain time within which he is to be entitled to decide, whether he will accept it or not, the party making such offer is not at liberty to withdraw it before the lapse of the appointed time. There are certainly very strong reasons in support of this doctrine. Highly respectable authors regard it as inconsistent with the plain principles of equity, that a person, who has been induced to rely on such an engagement, should have no remedy in case of disappointment. But whether wisely and equitably or not, the common law unyieldingly insists upon a consideration, or a paper with a seal attached.

The authorities, both English and American, in support of this view of the subject, are very numerous and decisive; but it is not deemed to be needful or expedient to refer particularly to them, as they are collected and commented on in several reports as well as in the text-books. The case of Cooke v. Oxley, 3 T. R. 653, in which a different doctrine was held, has occasioned considerable discussion, and in one or two instances has probably influenced the decision. That case has been supposed to be inaccurately reported, and that in fact there was in that case no acceptance. But however that may be, if the case has not been directly overruled, it has certainly in later cases been entirely disregarded, and cannot now be considered as of any authority.

As therefore in the present case the bill sets out a proposal in writing, and an acceptance and an offer to perform, on the part of the plaintiffs, within the time limited, and while the offer was in full force, all which is admitted by the demurrer, so that a valid contract in writing is shown to exist, the demurrer must be overruled.

9 Cyc. 284 (5).

QUICK *v.* WHEELER.

78 NEW YORK, 300.—1879.

EARL, J. This action was brought to recover the price of a quantity of tie timber which the plaintiff claimed to have sold and delivered to the defendant. The plaintiff recovered, and his judgment having been affirmed at the General Term, the defendant appealed to this court.

The timber is claimed to have been delivered under a written contract with the defendant, which was executed August 2d, 1873. It

provided first for the sale and delivery by the plaintiff to the defendant of 5000 feet of such timber. That part of the contract was fully performed by both parties. It then provided as follows: "And I, said Wheeler, also agree to pay said Quick 4½ cents per foot for from 6000 to 15,000 feet of same kind and quality of tie timber as aforesaid, and delivered at the place aforesaid during the winter, to be paid on June 1st, 1874." The contract was signed by both parties, but there was no agreement on the part of the plaintiff to deliver this last quantity. The place of delivery named in the contract was "on the bank of the west branch of the Delaware River at Ball's Eddy," and there plantiff delivered the 11,355 feet of timber for which this recovery was had. . . .

This contract when made was not binding, as it was based upon no consideration. The plaintiff parted with nothing and there was no mutuality. There was not the consideration which mutual promises give a contract. The plaintiff did not bind himself to sell and deliver the tie timber. Hence this contract can be treated only as a written offer on the part of the defendant to take and pay for the timber upon the terms stated. (Story on Sales, §§ 124, 126; Chitty on Contracts, 15; 1 Parsons on Contracts [5th ed.], 475; Tuttle v. Love, 7 J. R. 470.) This written offer could be revoked at any time before performance or a binding acceptance by the plaintiff. Was it thus revoked? All the evidence tending to show a revocation or rescission came from the plaintiff as a witness. He testified that in December, 1873, after he had delivered several thousand feet of the timber—about the time of the settlement for that delivered under the prior clause in the contract—the following conversation took place between them: "He told me that he did not want me to get out any more timber. I said I had bought some timber, and he had encouraged me to buy timber, and had advanced money to make payment, and I had bought it, so I could not get out of that, and I could not store it." Nothing more was said. The plaintiff then went on with the performance of the contract, and between that date and March delivered at the place designated in the contract the balance of the timber, the defendant at no time making any further objection. After the delivery plaintiff had the timber measured; and he then delivered a bill of the measurement at defendant's store, in his absence, on June 1st, 1874, to a man by the name of Titus, who promised to write to defendant. In July, plaintiff saw defendant and spoke to him about the timber, and he said that as soon as his boys came home we would go and look at the timber; and this promise he repeated afterward, making no claim then that the contract had been rescinded, or that he was not liable to pay for the timber, if it was according to the contract. Upon all these facts it cannot be said as matter of law that the parties understood that the offer was revoked.

It is quite clear that the plaintiff did not so understand it, and it is at least doubtful if the defendant so understood it. It is true that he told the plaintiff not to get out any more timber; but when he learned that the plaintiff had already got out a large quantity, and that he was bound for more, which he had purchased to perform this contract, he was silent, said nothing more. We may assume that he knew the defendant was engaged in performing the contract during the winter; and after all the timber was delivered, he did not plant himself in any way upon a revocation of his offer; but when informed that it had been delivered, promised to go and look at it. Proof of the revocation, under such circumstances, should have been unequivocal and satisfactory, before a court could hold as matter of law that the revocation was established. In this case, the question of revocation, upon the evidence, the conduct of the parties and the circumstances, was one for the jury; and there was no request to have it submitted to the jury, and hence there was no error here. . . .

Without more it is sufficient to say that we concur in the satisfactory opinion at General Term. All concur. Judgment affirmed.

9 Cyc. 284 (5); 285 (8).

LOS ANGELES TRACTION CO. *v.* WILSHIRE.

135 CALIFORNIA, 654.—1902.

GRAY, C. The action is based on a written instrument, signed by appellants, and reading as follows:

"$2,000. LOS ANGELES, Cal., July 19th, 1895.

"Thirty days after the completion of the double-track street railway of the Los Angeles Traction Company to the intersection of Seventh and Hoover Streets, for value received, I promise to pay to the order of the Los Angeles Traction Company, the sum of two thousand (2,000) dollars, negotiable and payable at the Citizen's Bank, with interest at the rate of eight per cent per annum, payable after maturity. I further promise and agree to pay a reasonable attorney's fee if suit should be instituted for the collection of this note."

The above instrument was placed in the hands of the Citizen's Bank, together with a duly signed written escrow agreement. . . .

On the faith of the foregoing instruments, and other instruments of like character executed by other parties, who, like defendants, were owners of property that would be made valuable by the construction of the proposed road, the plaintiff in November, 1895, less than four months from the execution of said instrument, bid and paid to the

city of Los Angeles $1,505 for a franchise to construct the road over that part of the course agreed upon and within the city limits. Before the 28th of April, 1896, the plaintiff commenced work upon said railway, but said work was not performed with the intention of prosecuting the construction of said railway continuously and with diligence to completion, and the plaintiff did not so commence work upon said railway with said purpose until after the first day of July, 1897. On July 1, 1897, defendants served upon plaintiff a written notice to the effect that they did not recognize any liability on account of the foregoing written contracts, for the reason that the road had not been completed within the time agreed upon. Soon after the service of this notice, the plaintiff actively engaged in the construction of the road and completed it, and commenced operating the same to the intersection of Seventh and Hoover streets, as provided for in said instruments, before the expiration of the year 1897. Thereafter, and on May 17, 1898, plaintiff completed its railway to First and Virgil streets. Upon these facts plaintiff had judgment for two thousand dollars, besides interest and attorney's fees. Defendants appeal from this judgment and from an order denying them a new trial. . . .

The contract at the date of its making was unilateral, a mere offer that, if subsequently accepted and acted upon by the other party to it, would ripen into a binding, enforceable obligation. When the respondent purchased and paid upwards of fifteen hundred dollars for a franchise, it had acted upon the contract; and it would be manifestly unjust thereafter to permit the offer that had been made to be withdrawn. The promised consideration had then been partly performed, and the contract had taken on a bilateral character, and if appellant thereafter thought he discovered a ground for rescinding the contract, it was, as it always is, a necessary condition to the rescission that the other party should be made whole as to what he had parted with on the strength of the contract. The notice of withdrawal from the contract was ineffectual, therefore, for several reasons. In the first place it was based on a wrong theory; the reason given for it was that the road was not constructed within the agreed time, when, as was determined subsequently by the court, there was no time agreed upon. Again, it came too late, after the obligations of the parties had become fixed.[1] . . .

W. P. 34–35 (39–40); 26 H. L. R. 274. Ashley, "Offers calling for a consideration other than a counter promise," 23 H. L. R. 158.

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[1] In Zwolanck v. Baker Co., 150 Wis. 517, plaintiff was in the employ of defendant under a continuing contract at stipulated wages. The defendant furthermore offered a share of profits to any employee who "shall have been in the regular employ of the company for 4500 hours during 100 consecutive

RAFOLOVITZ *v.* AMERICAN TOBACCO CO.

73 HUN, 87.—1893.

(NEW YORK SUPREME COURT, GENERAL TERM.)

PARKER, J. This case was well disposed of at the Special Term, and the argument supporting the disposition made was so fully presented as to render further consideration of the question discussed unnecessary. The appellant now makes a point which does not seem to have been addressed to the Special Term, and in order to meet it it will be necessary to state briefly the conclusion reached by that court. The pleader attempted to allege two distinct causes of ac-

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weeks . . . provided he does not quit the employ of the company or is not discharged prior to January 1 of any year." Plaintiff had worked more than the required period but defendant dispensed with his services on December 30, 1909. In an action brought by plaintiff for a share of the profits for the year 1909, the court said: "Under such a state of facts the plaintiff is entitled to recover. It is true, as a general proposition that a party making an offer of a reward may withdraw it before it is accepted. But persons offering rewards must be held to the exercise of good faith and cannot arbitrarily withdraw their offers for the purpose of defeating payment, when to do so would result in the perpetration of a fraud upon those who in good faith attempted to perform the service for which the reward was offered."

Possible hardship considered.—Professor Langdell, Contr. p. 3, says that in unilateral contracts "as the performance of the consideration is what converts an offer into a binding promise, it follows that the promise is made in legal intendment at the moment when the performance of the consideration is completed. It also follows that up to that moment the offer may either be revoked, or be destroyed by the death of the offerer, and the offeree thus be deprived of any compensation for what he has done. As this may cause great hardship and practical injustice, ingenious attempts have been made to show that the offer becomes irrevocable as soon as the performance of the consideration begins; but such a view seems to have no principle to rest upon. Besides, there may be hardship on the other side as well; for the offeree may at any stage refuse to proceed further in performing the consideration, or he may die, and then the offerer will confessedly be without remedy. The true protection for both parties is to have a binding contract made before performance begins, by means of mutual promises; and if they neglect this precaution, any hardship that they may suffer should be left at their own doors."

And in Clark v. Russel, 3 Watts, 217, Gibson, C. J., says: "If I promise my neighbour to compensate him if he will do a specific act of service for me, and he does it in consequence, he may maintain an action though he had not bound himself to do it. The consideration of such a promise belongs to the class called executory, the promise itself being in its nature conditional. But what if the defendant should desist, having performed the act in part? He would forfeit his interest in the promise; neither could he recover a quantum meruit; and the parties would be where they began. But the promisor may

tion founded in two separate contracts. But while there were two contracts, they were in the same form, and but one need be quoted. As alleged it reads: "On or about the 10th day of April, 1892, the defendant and Joseph Rafolovitz & Son . . . entered into an agreement or contract whereby and wherein the defendant promised and agreed, in consideration that said Joseph Rafolovitz & Son would purchase and sell a certain cigarette manufactured by defendant, that he, the defendant, would allow and pay them as a compensation or commission for said purchase of cigarettes twenty cents on every thousand of said cigarettes manufactured by defendant and purchased by said Joseph Rafolovitz & Son, between the 10th day of April and the 1st day of October, 1892."

It seems that Joseph Rafolovitz & Son did thereafter purchase nearly 200,000 cigarettes, upon which purchase the defendant paid the promised commissions. Then it refused to sell to plaintiff any more cigarettes, hence this action. The court held that there was no mutuality of contract, and, therefore, not enforcible. That it would have been otherwise had the plaintiff bound himself to have purchased a given quantity of cigarettes. That under the agreement, as alleged, it was optional with the plaintiff to purchase cigarettes or not. If, after making it, he had refused to take any, or after taking a few thousand, had declined to purchase others, the defendant could not have compelled him either to take the cigarettes or respond in damages for not doing so. And as he made no promise, there was no basis for a consideration for the promise of the other party to the alleged agreement. In support of such position the court cited Chicago & Great Eastern Ry. Co. v. Dane (43 N. Y. 240) and Hurd v. Gill, (45 id. 341).

Appellant insists that Wells v. Alexander (130 N. Y. 642) upholds the agreement which he alleges, but we do not so understand it. There the plaintiff proposed to furnish defendant's steamers, naming them, with coal, at a price named, for the period of one year. The defendant accepted the offer, and thereafter plaintiff furnished to the defendant such quantity of coal as was required for the use of the steamships, until the defendant sold them. It was held that the proposal and acceptance, both of which were in writing, constituted a valid contract, there being entire mutuality, because one promised to take and pay for all that the other agreed to sell and deliver. The principal contention of the defendant in that case was, that the contract was one for successive deliveries of coal, to be made only when

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have sustained damage or at least disappointment by the other's default. He undoubtedly may; but it is his folly not to guard against it by exacting a mutual engagement instead of making a conditional one, which leaves the party employed to earn the promised reward or not at his pleasure."

the defendant should give the plaintiff notice that a delivery was required, and as notice had not been given, the defendant was not in default. It was held that while at the date of the agreement the quantity was indefinite, it was nevertheless determinable by the terms of the contract, and therefore, within the maxim *Certum est quod, certum reddi potest;* the necessity for notice was doubted, and it was asserted that if notice was required, a covenant on the part of the defendant to give it would be inferred, for otherwise the contract would be unreasonable, and place one of the parties entirely at the mercy of the other. It will be seen, therefore, that the questions presented for decision in the two cases are entirely different.

The appellant calls our attention to a number of cases in which courts, having in mind the peculiar facts of the cases under consideration, have said that upon a demurrer the consideration will be implied, and another line of cases holding that a consideration may be shown by extrinsic evidence, but those cases are not applicable here because the complaint undertakes to state the consideration. It avers that the consideration moving to defendant was that Joseph Rafolovitz & Son would purchase and sell a certain cigarette manufactured by defendant. But, as stated, there was no promise on the part of Joseph Rafolovitz & Son to purchase cigarettes, which was enforcible by defendant, and, therefore, it did not furnish a consideration for the defendant's promise. Undoubtedly, if there had been some other consideration for defendant's promise, moving from Joseph Rafolovitz & Son, defendant's agreement could have been enforced, notwithstanding the absence of an obligation on the part of the plaintiff to purchase cigarettes. So if the complaint had alleged that the agreement pleaded was founded upon a good and sufficient consideration, some of the cases to which the appellant calls our attention would be applicable. Under such an allegation the plaintiff upon trial would be permitted to show by extrinsic evidence the consideration for defendant's promise. (Hurd v. Gill, 45 N. Y. 341). This was not done, presumably because it was not the fact. It must be assumed that the complaint correctly states the facts. And that presumption attaches to its statement as to what constituted the consideration, as well as its allegations in respect to the other features of the agreement. In disposing of the demurrer, therefore, it could not be inferred that some other consideration than that alleged in the complaint existed in fact, or could be proved on the trial. The sufficiency of the alleged consideration was adequately discussed at Special Term, and with the conclusion reached we agree.

The judgment should be affirmed, with costs, but with leave to the plaintiff, on payment of the costs so far awarded against him, to amend his complaint within twenty days after service of notice of the entry of the order of affirmance.

9 Cyc. 329 (21); W. P. 196 (10).

MONTGOMERY, C. J., IN HICKEY *v.* O'BRIEN.

123 MICHIGAN, 611.—1900.

On the 1st of March, 1895, a contract, to which John F. Lucas & Co. were designated as parties of the first part and Kreutzberger & Crabbe were parties of the second part, was executed by the parties. Its material provisions were as follows: "In consideration of the covenants and conditions hereinafter mentioned, first parties hereby agree to furnish second parties with all the ice that they may require to carry on their ice business in said city for the period of five years from and after March 1st, 1895, at the rate of seventy-five ($.75) cents per ton, to be paid for monthly from and after June 1st, 1895. Second parties hereby agree to purchase from first parties all the ice necessary to carry on their ice business in said city for the period of five years from and after March 1st, 1895, and to pay first parties therefor the sum of seventy-five ($.75) cents per ton, to be paid monthly from and after June 1st, 1895. . . ."

The cases which deal with contracts to supply goods to answer the needs of business are not in entire harmony. In Bailey v. Austrian, 19 Minn. 535 (Gil. 465), it was held that a contract to supply plaintiffs with all the pig iron wanted by them until a certain date was *nudum pactum,* as plaintiff did not engage to *want* any quantity whatever. A similar holding was made in Iowa in the case of Drake v. Vorse, 52 Iowa, 417, 3 N. W. 465. In Cooper v. Wheel Co., 94 Mich. 272, 54 N. W. 39, we had occasion to consider the case of Bailey v. Austrian, but did not in terms decide whether such engagement bound the orderer to take any particular quantity. In National Furnace Co. v. Keystone Mfg. Co., 110 Ill. 427, the case of Bailey v. Austrian is considered as to its bearing on the question here involved. The court point out that in the Bailey Case stress is laid on the word *"want."* In the Illinois case cited, the plaintiff agreed to sell to the defendant all the iron needed in its business during the three ensuing years at $22.35 per ton. The defendant agreed to take its year's supply at that price. The court say: "We do not regard the contract void on the ground stated. It is true that appellee was only bound by the contract to accept of appellant the amount of iron it needed for use in its business; but a reasonable construction must be placed on this part of the contract, in view of the situation of the parties. Appellee was engaged in a large manufacturing business, necessarily using a large quantity of iron in the transaction of its business. It is not to be presumed that appellee would close its business, and need no iron; but, on the contrary, the reasonable presumption would be that the business would be continued, and appellee would necessarily need the quantity of iron which it had been in

the habit of using during previous years. It cannot be said that appellee was not bound by the contract. It had no right to purchase iron elsewhere for use in its business. If it had done so, appellant might have maintained an action for a breach of the contract. It was bound by the contract to take of appellant, at the price named, its entire supply of iron for the year; that is, such a quantity of iron, in view of the situation and business of appellee, as was reasonably required and necessary in its manufacturing business." See, also, Smith v. Morse, 20 La. Ann. 220; Wells v. Alexandre 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218. In the present case we think the true construction is that Kreutzberger & Crabbe undertook to take ice of Lucas & Co. for the period of five years; that the quantity which they agreed to take was to be measured by the necessities of their business, but that this presupposed that they would have a business for the time agreed.

9 Cyc. 329 (21, 24); W. P. 196 (10); 14 H. L. R. 150, 156; 5 Mich. L. R. 681.

THE CHICAGO & GREAT EASTERN RAILWAY COMPANY *v.* DANE AND OTHERS.

43 NEW YORK, 240.—1870.

This is an appeal from a judgment of the General Term of the Supreme Court in the first judicial district, affirming a judgment for the defendant entered upon the report of a referee.

This action was brought to recover damages on an alleged contract of the defendant to carry and transport a quantity of railroad iron from New York to Chicago for the plaintiffs. The only evidence of the contract were the letters quoted in the opinion of the court. The defendant insisted that the agreement was invalid for want of the proper United States internal revenue stamp affixed at the time it was made. But the referee overruled the objection, holding that it was sufficient under § 173 of the revenue act of June 30th, 1864, to stamp the instrument on its production in court. This point was not passed on in this court.

GROVER, J. Whether the letter of the defendants to plaintiff, and the answer of plaintiff thereto (leaving the question of revenue stamps out of view), proved a legal contract for the transportation of iron by the defendants for the plaintiff from New York to Chicago upon the terms therein specified, depends upon the question whether the plaintiff became thereby bound to furnish any iron to the defendants for such transportation, as there was no pretence of any consideration for the promise of the defendants to transport the iron, except the mutual promise of the plaintiff to furnish it for that pur-

pose, and to pay the specified price for the service. Unless, therefore, there was a valid undertaking by the plaintiff so to furnish the iron, the promise of the defendants was a mere nude pact, for the breach of which no action can be maintained. The material part of the defendants' letter affecting this question is as follows: "We hereby agree to receive in this port (New York), either from yard or vessel, and transport to Chicago, by canal and rail or the lakes, for and on account of the Chicago & Great Eastern Railway Company, not exceeding 6000 tons gross (2240 pounds) in and during the months of April, May, June, July and August, 1864, upon the terms and for the price hereinafter specified." This letter was forwarded by the defendants to the plaintiff April 15th, 1864. On April 16th the plaintiff answered this letter, the material part of which was as follows: "In behalf of this company I assent to your agreement, and will be bound by its terms."

We have seen that the inquiry is, whether this bound the plaintiff to furnish any iron for transportation. It is manifest that the word "agree" in the letter of the defendants was used as synonymous with the word "offer," and that the letter was a mere proposition to the plaintiff for a contract to transport for it any quantity of iron upon the terms specified, not exceeding 6000 tons, and that it was so understood by the plaintiff. The plaintiff was at liberty to accept this proposition for any specified quantity not beyond that limited; and had it done so, a contract mutually obligatory would have resulted therefrom, for the breach of which by either party the other could have maintained an action for the recovery of the damages thereby sustained. This mutual obligation of the parties to perform the contract would have constituted a consideration for the promise of each. But the plaintiff did not so accept. Upon the receipt of the defendants' offer to transport not to exceed 6000 tons upon the terms specified, it merely accepted such offer, and agreed to be bound by its terms. This amounted to nothing more than the acceptance of an option by the plaintiff for the transportation of such quantity of iron by the defendants as it chose; and had there been a consideration given to the defendants for such option, the defendants would have been bound to transport for the plaintiff such iron as it required within the time and quantity specified, the plaintiff having its election not to require the transportation of any. But there was no consideration received by the defendants for giving any such option to the plaintiff. There being no consideration for the promise of the defendants, except this acceptance by the plaintiff, and that not binding it to furnish any iron for transportation unless it chose, it follows that there was no consideration for any promise of the defendants, and that the breach of such promise furnishes no foundation for an action.

The counsel for the defendants insists that the contract may be upheld for the reason that at the time the letters were written the defendants were engaged in transporting iron for the plaintiff. But this had no connection with the letters any more than if the defendants were at the time employed in any other service for the plaintiff. Nor does the fact that the defendants, after the letters were written, transported iron for the plaintiff at all aid in upholding the contract. This did not oblige the plaintiff to furnish any additional quantity, and consequently constituted no consideration for a promise to transport any such. The counsel for the appellant further insists that the letter of defendant was a continuing offer, and that the request of the plaintiff, in August, to receive and transport a specified quantity of iron was an acceptance of such offer, and that the promises then became mutually obligatory, if not so before. This position cannot be maintained. Upon receipt of the defendants' letter, the plaintiff was bound to accept in a reasonable time and give notice thereof, or the defendant was no longer bound by the offer. The judgment appealed from must be affirmed with costs.

All the judges concurring except ALLEN, J., who, having been of counsel, did not sit.

Judgment affirmed.[1]

9 Cyc. 258 (10); 291 (38); 327 (20); 329 (21); W. P. 196 (10).

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[1] In Great Northern Ry. Co. v. Witham, L. R. 9 C. P. 16, the defendant in answering an advertisement for tenders, wrote to plaintiff as follows: "I, the undersigned hereby undertake to supply the G. N. Ry. Co. for twelve months from the first of November, 1871, to 31st of October, 1872, with such quantities of each or any of the several articles named in the attached specification, as the company's storekeeper may order, from time to time, at the price set opposite each article respectively, and agree to abide by the conditions stated on the other side. (Signed) Samuel Witham. The plaintiff's officer replied accepting the tender. Plaintiff sued to recover for the defendant's failure to deliver an order and recovered judgment. Bishop on Contract (1887) sec. 78, commenting on the case says, "the parties agreed that one of them should supply the other during a designated period with certain stores, as the latter might order. He made an order, which was filled; then made another which was declined; and on suit brought the defendant rested his case on the lack of mutuality in the contract, which, he contended, rendered it void. Plainly it stood, in law, as a mere continuing offer by the defendant; but when the plaintiff made an order, he thereby accepted the offer to the extent of the order, and it was too late for the other to recede. So judgment went for the plaintiff; Brett, J., observing that this case 'does not decide the question whether the defendant might have absolved himself from the further performance of the contract by giving notice.'"

b. An offer under seal is irrevocable.

McMILLAN *v.* AMES

33 MINNESOTA, 257.—1885.

VANDERBURGH, J. On the day it bears date the defendant executed and delivered to James McMillan & Co. the following covenant or agreement under seal, which was subsequently assigned to the plaintiff:

[Here follows a copy of the instrument.]

By the terms of this instrument, which is admitted to have been sealed by defendant, he covenanted to convey the premises upon the consideration and condition of the payment by the covenantees of the sum named, on or before the date fixed in the writing. Before performance on their part, the defendant notified them of his withdrawal and rescission of the promise and obligation embraced in such written instrument, and thereafter refused the tender of payment and offer of performance by the plaintiff in conformity therewith, as alleged in the complaint, and within the time limited. On the trial, it appearing that such notice of rescission had been given, the court rejected plaintiff's offer to introduce the writing in evidence, and dismissed the action.

The only question presented on this appeal is whether defendant's promise or obligation was *nudum pactum* and presumptively invalid for want of a consideration, or whether, being in the nature of a covenant, the defendant was bound thereby, subject to the performance of the conditions by the covenantees.

Apart from the effect of the seal as evidencing a consideration binding the defendant to hold open his proposition, or rather validating his promise subject to the conditions expressed in the writing, it is clear that such promise, made for a consideration thereafter to be performed by the plaintiff at his election, would take effect as an offer or proposition merely, but would become binding as a promise as soon as accepted by the performance of the consideration, unless previously revoked or it had otherwise ceased to exist. Langdell on Cont. 70; Boston & M. R. R. v. Bartlett, 3 Cush. 224, 228. In the case cited there was a proposition to sell land by writing not under seal. The court held the party at liberty to withdraw his offer at any time before acceptance, but not after, within the appointed time, because until acceptance it was a mere offer, without a consideration or a corresponding promise to support it, and the court say: "Whether wisely or not, the common law unyieldingly insists upon a consideration, or a paper with a seal attached."

If, however, his promise is binding upon the defendant, because contained in an instrument under seal, then it is not a mere offer,

but a valid promise to convey the land upon the condition of payment. All that remained was performance by plaintiff within the time specified to entitle him to a fulfilment of the covenant to convey. Langdell on Cont. 178, 179. As respects the validity or obligation of such unilateral contracts, the distinction between covenants and simple contracts is well defined and established. Anson, Cont. 12; Chit. Cont. 5; Leake, Cont. 146; 1 Smith, Lead. Cas. (7th ed.) 698; Wing v. Chase, 35 Me. 260; Willard v. Tayloe, 8 Wall. 557.

In Pitman v. Woodbury (3 Exch. 4, 11) Parke, B., says: "The cases establish that a covenantee in an ordinary indenture, who is a party to it, may sue the covenantor, who executed it, although he himself never did; for he is a party, although he did not execute, and it makes no difference that the covenants of the defendant are therein stated to be in consideration of those of the covenantee. Of this there is no doubt, nor that a covenant binds without consideration." Morgan v. Pike, 14 C. B. 473, 484; Leake, Cont. 141. The covenantee in such cases may have the benefit of the contract, but subject to the conditions and provisos in the deed. The obligations frequently take the form of bonds, which is only another method of forming a contract, in which a party binds himself as if he had made a contract to perform; a consideration being necessarily implied from the solemnity of the instrument. The consideration of a sealed instrument may be inquired into; it may be shown not to have been paid (Bowen v. Bell, 20 John. 338), or to be different from that expressed (Jordan v. White, 20 Minn. 77 [91]; McCrea v. Purmort, 16 Wend. 460), or as to a mortgage that there is no debt to secure (Wearse v. Peirce, 24 Pick. 141), etc.; but, except for fraud or illegality, the consideration implied from the seal cannot be impeached for the purpose of invalidating the instrument or destroying its character as a specialty.

It is true that equity will not lend its auxiliary remedies to aid in the enforcement of a contract which is inequitable, or is not supported by a substantial consideration, but at the same time it will not on such grounds interfere to set it aside. But no reason appears why equity might not have decreed specific performance in this case (had the land not been sold), because the substantial and meritorious consideration required by the court in such case would consist in that stipulated in the instrument as the condition of a conveyance, performance of which by the plaintiff would have been exacted as a prerequisite to relief, so as to secure to defendant mutuality in the remedy, and all his rights under the contract. The inquiry would not, in such case, be directed to the constructive consideration evidenced by the seal, for a mere nominal consideration would have supported the defendant's offer or promise upon the prescribed conditions. Leake, Cont. 17, 18; Western R. Co. v. Babcock, 6 Met. 346;

Yard v. Patton, 13 Pa. St. 278, 285; Candor's Appeal, 27 Pa. St. 119.

If, then, defendant's promise was irrevocable within the time limited, plaintiff might certainly seek his remedy for damages, upon the facts alleged in the pleadings, upon showing performance or tender thereof on his part.

There is a growing tendency to abrogate the distinction between sealed and unsealed instruments; in some States by legislation, in others to a limited extent by usage or judicial recognition. State v. Young, 23 Minn. 551; 1 Pars. Cont. 429. But the significance of the seal as importing a consideration is everywhere still recognized, except as affected by legislation on the subject. It has certainly never been questioned by this court. In Pennsylvania the courts allow a party, as an equitable defense in actions upon sealed instruments, to show a failure to receive the consideration contracted for, where an actual valuable consideration was intended to pass, and furnished the motive for entering into the contract. Candor's Appeal, 27 Pa. St. 119; Yard v. Patton, supra. But whatever the rule as to equitable defenses and counter-claims under our system of practice may properly be held to be in the case of sealed instruments, it has no application, we think, to a case like this, where full effect must be given to the seal. Under the civil law the rule is that a party making an offer, and granting time to another in which to accept it, is not at liberty to withdraw it within the appointed time, it being deemed inequitable to disappoint expectations raised by such offer, and leave the party without remedy. The common law, as we have seen, though requiring a consideration, is satisfied with the evidence thereof signified by a seal. Boston & M. R. R. v. Bartlett, *supra*. The same principle applies to a release under seal, which is conclusive though disclosing on its face a consideration otherwise insufficient. Staples v. Wellington, 62 Me. 9; Wing v. Chase, 35 Me. 260.

These considerations are decisive of the case, and the order denying a new trial must be reversed.

9 Cyc. 287-288 (20-21); W. P. 35 (40); 55 (62).

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c. Must the revocation be communicated?

COLEMAN *v.* APPLEGARTH.

68 MARYLAND, 21.—1887.

ALVEY, C. J. Coleman, the appellant, filed his bill against Applegarth and Bradley, the appellees, for a specific performance of what is alleged to be a contract made by Applegarth with Coleman for the sale of a lot of ground in the city of Baltimore. The contract upon

which the application is made, and which is sought to be specifically enforced, reads thus:

"For and in consideration of the sum of five dollars paid me, I do hereby give to Charles Coleman the option of purchasing my lot of ground, northwest corner, etc., assigned to me by Wright and McDermot, by deed dated, etc., subject to the ground rent therein mentioned, at and for the sum of $645 cash, at any time on or before the first day of November, 1886."

It was dated the 3rd of September, 1886, and signed by Applegarth alone.

The plaintiff, Coleman, did not exercise his option to purchase within the time specified in the contract; but he alleges in his bill that Applegarth, after making the contract of the 3d of September, 1886, and before the expiration of the time limited for the exercise of the option, verbally agreed with the plaintiff to extend the time for the exercise of such option to the 1st of December, 1886. It is further alleged that, about the 9th of November, 1886, without notice to the plaintiff, Applegarth sold, and assigned by deed, the lot of ground to Bradley, for the consideration of $700; and that subsequently, but prior to the 1st of December, 1886, the plaintiff tendered to Applegarth, in lawful money, the sum of $645, and demanded a deed of assignment of the lot of ground, but which was refused. It is also charged that Bradley had notice of the optional right of the plaintiff at the time of taking the deed of assignment from Applegarth, and that such deed was made in fraud of the rights of the plaintiff under the contract of September 3, 1886. The relief prayed is, that the deed to Bradley may be declared void, and that Applegarth may be decreed to convey the lot of ground to the plaintiff upon payment by the latter of the $645, and for general relief.

The defendants, both Applegarth and Bradley, by their answers, deny that there was any binding contract, or optional right existing in regard to the sale of the lot, as between Applegarth and the plaintiff, at the time of the sale and transfer of the lot to Bradley; and the latter denies all notice of the alleged agreement for the extension of time for the exercise of the option by the plaintiff; and both defendants rely upon the statute of frauds as a defense to the relief prayed.

The plaintiff was examined as a witness in his own behalf and he also called and examined both of the defendants as witnesses in support of the allegation of his bill. But without special reference to the proof taken, the questions that are decisive of the case may be determined upon the facts as alleged by the bill alone, in connection with the contract exhibited, as upon demurrer; such facts being considered in reference to the grounds of defense interposed by the defendants.

The contract set up is not one of sale and purchase, but simply for the option to purchase within a specified time, and for a given

price. It was unilateral and binding upon one party only. There was no mutuality in it, and it was binding upon Applegarth only for the time stipulated for the exercise of the option. After the lapse of the time given, there was nothing to bind him to accept the price and convey the property; and the fact that this unilateral agreement was reduced to writing added nothing to give it force or operative effect beyond the time therein limited for the exercise of the option by the plaintiff. It is quite true, as contended by the plaintiff, that, as a general proposition, time is not deemed by courts of equity as being of the essence of contracts; and that, in perfected contracts, ordinarily, the fact that the time for performance has passed will not be regarded as a reason for withholding specific execution. But while this is the general rule upon the subject, that general rule has well-defined exceptions, which are as constantly recognized as the general rule itself. If the parties have, as in this case, expressly treated time as of the essence of the agreement, or if it necessarily follows from the nature and circumstances of the agreement that it should be so regarded, courts of equity will not lend their aid to enforce specifically the agreement, regardless of the limitation of time. 2 Story's Eq. Jur. sec. 776. Here, time was of the very essence of the agreement, the nominal consideration being paid to the owner for holding the property for the specified time, subject to the right of the plaintiff to exercise his option whether he would buy it or not. When the time limited expired, the contract was at an end, and the right of option gone, if that right has not been extended by some valid binding agreement that can be enforced. This would seem to be the plain dictate of reason, upon the terms and nature of the contract itself; and that is the plain result of the decision of this court, made in respect to an optional contract to purchase, in the case of Maughlin v. Perry, 35 Md. 352, 359, 360.

As must be observed, it is not alleged or pretended that the plaintiff attempted to exercise his option, and to complete a contract of purchase, within the time limited by the written agreement of the 3d of September, 1886. But it is alleged and shown that before the expiration of such time, the defendant Applegarth verbally agreed or promised to extend the time for the exercise of the option by the plaintiff from the 1st of November to the 1st of December, 1886; and that it was within this latter or extended period and after the property had been sold and conveyed to Bradley, that the plaintiff proffered himself ready to accept the property and pay the price therefor. It is quite clear, however, that such offer to accept the property came too late. There was no consideration for the verbal promise or agreement to extend the time, and such promise was a mere *nudum pactum*, and therefore not enforceable to say nothing of the statute of frauds, which has been invoked by the defendants.

After the 1st of November, 1886, the verbal agreement of Applegarth operated simply as a mere continuing offer at the price previously fixed, and which offer only continued until it should be withdrawn or otherwise ended by some act of his; but he was entirely at liberty at any time, before acceptance, to withdraw the offer; and the subsequent sale and transfer of the property to Bradley had the effect at once of terminating the offer to the plaintiff. Pomeroy on Specific Performance, secs. 60, 61.

The principles that govern in cases like the present are very fully and clearly stated by the English court of appeal in chancery in the case of Dickinson v. Dodds, 2 Ch. Div. 463. That case, in several of its features, is not unlike the present. There the owner of property signed a document which purported to be an agreement to sell it at a fixed price, but added a postscript, which he also signed, in these words: "This offer to be left over until Friday, nine o'clock, A.M.," two days from the date of the agreement. Upon application of the party, who claimed to be vendee of the property, for specific performance, it was held, upon full and careful consideration by the court of appeal, that the document amounted only to an offer, which might be withdrawn at any time before acceptance, and that a sale to a third person which came to the knowledge of the person to whom the offer was made was an effectual withdrawal of the offer. In the course of his judgment, after declaring the written document to be nothing more than an offer to sell at a fixed price, Lord Justice James said:

"There was no consideration given for the undertaking or promise, to whatever extent it may be considered binding, to keep the property unsold until nine o'clock on Friday morning; but apparently Dickinson was of opinion, and probably Dodds was of the same opinion, that he (Dodds) was bound by that promise, and could not in any way withdraw from it, or retract it, until nine o'clock on Friday morning, and this probably explains a good deal of what afterwards took place. But it is clear, settled law, on one of the clearest principles of law, that this promise being a mere *nudum pactum*, was not binding, and that at any moment before complete acceptance by Dickinson of the offer, Dodds was as free as Dickinson himself. That being the state of things, it is said that the only mode in which Dodds could assert that freedom was by actually and distinctly saying to Dickinson, 'Now I withdraw my offer.' It appears to me that there is neither principle or authority for the proposition that there must be an express and actual withdrawal of the offer, or what is called a retractation. It must, to constitute a contract, appear that the two minds were at one, at the same moment of time, that is, that there was an offer continuing up to the time of the acceptance. If there was not such a continuing offer, then the acceptance comes to nothing."

And Lord Justice Mellish was quite as explicit in stating his judgment, in the course of which he said:

"He was not in point of law bound to hold the offer over until nine o'clock on Friday morning. He was not so bound either in law or in equity. Well, that being so, when on the next day he made an agreement with Allan to sell the property to him, I am not aware of any ground on which it can be said that that contract with Allan was not as good and binding a contract as ever was made. Assuming Allan to have known (there is some dispute about it, and Allan does not admit that he knew it, but I will assume that he did) that Dodds made the offer to Dickinson, and had given him until Friday morning at nine o'clock to accept it, still, in point of law, that could not prevent Allan from making a more favorable offer than Dickinson, and entering at once into a binding agreement with Dodds."

And further on he says:

"If the rule of law is that a mere offer to sell property, which can be withdrawn at any time, and which is made dependent on the acceptance of the person to whom it is made, is a mere *nudum pactum*, how is it possible that the person to whom the offer has been made can by acceptance make a binding contract after he knows that the person who has made the offer has sold the property to some one else? It is admitted law that if a man who makes an offer dies, the offer cannot be accepted after he is dead, and parting with the property has very much the same effect as the death of the owner, for it makes the performance of the offer impossible. I am clearly of opinion that, just as when a man who has made an offer dies before it is accepted it is impossible that it can then be accepted, so when one of the persons to whom the offer was made knows that the property has been sold to some one else, it is too late for him to accept the offer; and on that ground I am clearly of opinion that there was no binding contract for the sale of this property by Dodds to Dickinson."

In this case, the plaintiff admits that, at the time he proffered to Applegarth acceptance of the previous offer to sell at the price named, he was aware of the fact that the property had been sold to Bradley. It was therefore too late for him to attempt to accept the offer, and there was not, and could not be made by such proffered acceptance, any binding contract of sale of the property.

It follows that the decree of the court below, dismissing the bill of the plaintiff, must be affirmed.

Decree affirmed.[1]

9 Cyc. 289 (25); W. P. 28 (29); 33 (37); 18 H. L. R. 139.

[1] In Shuey v. U. S., 92 U. S. 73, the court said, as to communication of revocation of an offered reward: "The offer of a reward for the apprehension of Surratt was revoked on November 24th, 1865; and notice of the revocation was published. It is not to be doubted that the offer was revocable at any time before it was accepted, and before anything had been done in reliance upon it. There was no contract until its terms were complied with. Like any other offer of a contract, it might, therefore, be withdrawn before rights had accrued under it; and it was withdrawn through the same channel in which it

An offer need not be made to an ascertained person, but no contract can arise until it has been accepted by an ascertained person.

(*i.*) *Accidental compliance with terms of offer.*

FITCH *v.* SNEDAKER.

38 NEW YORK, 248.—1868.

WOODRUFF, J. On the 14th of October, 1859, the defendant caused a notice to be published, offering a reward of two hundred dollars . . . "to any person or persons who will give such information as shall lead to the apprehension and conviction of the person or persons guilty of the murder of" a certain unknown female.

On the 15th day of October, before the plaintiffs had seen or heard of the offer of this reward, one Fee was arrested and put in jail, and though not in terms so stated, the case warrants the inference, that, by means of the evidence given by the plaintiffs on his trial and their efforts to procure testimony, Fee was convicted.

This action is brought to recover the reward so offered. On the trial the plaintiffs proved the publication of the notice, and then proposed to prove that they gave information before the notice was known to them, which led to the arrest of Fee. This evidence was excluded. The plaintiffs then offered to prove, that, with a view to this reward, they spent time and money, made disclosures to the district attorney, to the grand jury and to the court on the trial after Fee was in jail, and that, without their effort, evidence, and exertion, no indictment or conviction could have been had. This evidence was excluded.

The court thereupon directed a nonsuit.

It is entirely clear that, in order to entitle any person to the reward offered in this case, he must give such information as shall lead to both apprehension and conviction. That is, both must happen, and happen as a consequence of the information given. No person could claim the reward whose information caused the apprehension, until conviction followed; both are conditions precedent. No

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was made. The same notoriety was given to the revocation that was given to the offer; and the findings of fact do not show that any information was given by the claimant, or that he did anything to entitle him to the reward offered, until five months after the offer had been withdrawn. True, it is found that then, and at all times until the arrest was actually made, he was ignorant of the withdrawal; but that is an immaterial fact. The offer of the reward not having been made to him directly, but by means of a published proclamation, he should have known that it could be revoked in the manner in which it was made."

one could therefore claim the reward, who gave no information whatever until after the apprehension, although the information he afterward gave was the evidence upon which conviction was had, and, however clear, that, had the information been concealed or suppressed, there could have been no conviction. This is according to the plain terms of the offer of the reward, and is held in Jones v. The Phœnix Bank, 8 N. Y. 228; Thatcher v. England, 3 Com. Bench, 254.

In the last case it was distinctly held, that, under an offer of reward, payable "on recovery of property stolen and conviction of the offender," a person who was active in arresting the thief and finding and restoring part of the stolen property, giving information to the magistrates, tracing to London other of the property and producing pawnbrokers with whom the prisoner had pledged it, and who incurred much trouble and expense in bringing together witnesses for the prosecution, was not entitled to the reward, as it appeared that another person gave the first information as to the party committing the robbery.

In the present case, the plaintiff, after the advertisement of the defendant's offer of a reward came to his knowledge, did nothing toward procuring the arrest, nor which led thereto, for at that time Fee had already been arrested.

The cases above referred to, therefore, established that, if no information came from the plaintiffs which led to the arrest of Fee, the plaintiffs are not entitled to recover, however much the information they subsequently gave, and the efforts they made to procure evidence, may have contributed to or even have caused his conviction, and, therefore, evidence that it was their efforts and information which led to his conviction was wholly immaterial, if they did not prove that they had given information which led to his apprehension, and was properly rejected.

The question in this case is simple. A murderer having been arrested and imprisoned in consequence of information given by the plaintiff before he is aware that a reward is offered for such apprehension, is he entitled to claim the reward in case conviction follows?

The ruling on the trial, excluding all evidence of information given by the plaintiffs before they heard of this reward, necessarily answers this question in the negative.

The case of Williams v. Carwardine (4 Barn. & Adol. 621), and same case at the assizes (5 Carr. & Payne, 566), holds that a person who gives information according to the terms of an offered reward is entitled to the money, although it distinctly appeared that the informer had suppressed the information for five months, and was led to inform, not by the promised reward, but by other motives. The court said the plaintiff had proved performance of the condition upon which the money was payable and that established her title.

That the court would not look into her motives. It does not appear by the reports of this case whether or not the plaintiff had ever seen the notice or handbill posted by the defendant, offering the reward; it does not, therefore, reach the precise point involved in the present appeal.

I perceive, however, no reason for applying to an offer of reward for the apprehension of a criminal any other rules than are applicable to any other offer by one, accepted or acted upon by another, and so relied upon as constituting a contract.

The form of action in all such cases is assumpsit. The defendant is proceeded against as upon his contract to pay, and the first question is, was there a contract between the parties?

To the existence of a contract there must be mutual assent, or in another form offer and consent to the offer. The *motive* inducing consent may be immaterial, but the consent is vital. Without that there is no contract. How then can there be consent or assent to that of which the party has never heard? On the 15th day of October, 1859, the murderer, Fee, had, in consequence of information given by the plaintiffs, been apprehended and lodged in jail. But the plaintiffs did not, in giving that information, manifest any assent to the defendant's offer, nor act in any sense in reliance thereon, they did not know of its existence. The information was voluntary, and in every sense (material to this case) gratuitous. The offer could only operate upon the plaintiffs after they heard of it. It was *prospective* to those who will, in the future, give information, etc.

An offer cannot become a contract unless acted upon or assented to.

Such is the elementary rule in defining what is essential to a contract. Chitty on Con. (5th Am. ed.), Perkins' notes, p. 10, 9, and 2, and cases cited. Nothing was here done to procure or lead to Fee's apprehension in view of this reward. Indeed, if we were at liberty to look at the evidence on the first trial, it would appear that Fee was arrested before the defendant offered the reward.

I think the evidence was properly excluded and the nonsuit necessarily followed.

The judgment should be affirmed.

Judgment affirmed.

9 Cyc. 254 (64); W. P. 13 (12).

DAWKINS *v.* SAPPINGTON.

26 INDIANA, 199.—1866.

FRAZER, J. The appellant was the plaintiff below. The complaint was in two paragraphs. 1. That a horse of the defendant

had been stolen, whereupon he published a handbill, offering a reward of $50 for the recovery of the stolen property, and that thereupon the plaintiff rescued the horse from the thief and restored him to the defendant, who refused to pay the reward. 2. That the horse of the defendant was stolen, whereupon the plaintiff recovered and returned him to the defendant, who, in consideration thereof, promised to pay $50 to the plaintiff, which he has failed and refused to do.

To the second paragraph a demurrer was sustained. To the first an answer was filed, the second paragraph of which alleged that the plaintiff, when he rescued the horse and returned him to the defendant, had no knowledge of the offering of the reward. The third paragraph averred that the handbill offering the reward was not published until after the rescue of the horse and his delivery to the defeudant. The plaintiff unsuccessfully demurred to each of these paragraphs, and refusing to reply the defendant had judgment.

1. Was the second paragraph of the complaint sufficient? The consideration alleged to support the promise was a voluntary service rendered for the defendant without request, and it is not shown to have been of any value. A request should have been alleged. This was necessary at common law, even in common count for work and labor (Chitty's Pl. 338), though it was not always necessary to prove an express request, as it would sometimes be implied from the circumstances exhibited by the evidence.

2. It is entirely unnecessary, as to the third paragraph of the answer, to say more than that, though it was highly improbable in fact, it was sufficient in law.

3. The second paragraph of the answer shows a performance of the service without the knowledge that the reward had been offered. The offer, therefore, did not induce the plaintiff to act. The liability to pay a reward offered seems to rest, in some cases, upon an anomalous doctrine, constituting an exception to the general rule. In Williams v. Carwardine (4 Barn. & Adolph. 621) there was a special finding, with a general verdict for the plaintiff, that the information for which the reward was offered was not induced to be given by the offer, yet it was held by all the judges of the King's Bench then present, Denman, C. J., and Littledale, Parke, and Patteson, JJ., that the plaintiff was entitled to judgment. It was put upon the ground that the offer was a general promise to any person who would give the information sought; that the plaintiff, having given the information, was within the terms of the offer, and that the court could not go into the plaintiff's motives. This decision has not, we believe, been seriously questioned, and its reasoning is conclusive against the sufficiency of the defense under examination. There are some considerations of morality and public policy which strongly tend to support the judgment in the case cited. If the offer was made in good faith,

why should the defendant inquire whether the plaintiff knew that it had been made? Would the benefit to him be diminished by the discovery that the plaintiff, instead of acting from mercenary motives, had been impelled solely by a desire to prevent the larceny from being profitable to the person who had committed it? Is it not well that any one who has an opportunity to prevent the success of a crime, may know that by doing so he not only performs a virtuous service, but also entitles himself to whatever reward has been offered therefor to the public?

The judgment is reversed, with costs, and the cause remanded, with directions to the court below to sutain the demurrer to the second paragraph of the answer.[1]

9 Cyc. 254 (65); W. P. 13 (12); 15 H. L. R. 484; 12 C. L. R. 643.

(*ii.*) *Offer distinguished from invitation to treat.*

MOULTON *v.* KERSHAW.

59 WISCONSIN, 316.—1884.

Action for damages for non-performance of a contract alleged to be contained in the following correspondence:

"MILWAUKEE, September 19, 1882.

"J. H. MOULTON, ESQ., La Crosse, Wis.

"*Dear Sir:* In consequence of a rupture in the salt trade, we are authorized to offer Michigan fine salt, in full car-load lots of eighty to ninety-five bbls., delivered at your city, at 85 cents per bbl., to be shipped per C. & N. W. R. R. Co. only. At this price it is a bargain, as the price in general remains unchanged. Shall be pleased to receive your order.

"Yours truly,

"C. J. KERSHAW & SON."

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[1] In Hewitt v. Anderson (56 Cal. 476) the court says: "The plaintiff, on the trial, testified that he did do the acts upon which he bases his claim to the reward with a view to obtaining it. On the other hand, there was evidence introduced by the defendants which tended to prove that the plaintiff had stated, under oath, that he had not expected any reward. In view of that conflict, we would not disturb a finding either way. And we are satisfied that under that finding the plaintiff cannot recover in this action. If he did not do the acts upon which he now bases his right to recover, with the intention of claiming the reward in the event of his accomplishing what would entitle him to it, he cannot recover it. If he had not known that a reward had been offered, he might, upon the authority of some cases, recover. But we are not aware of any case in which it has been held that a party, after disclaiming any intention to claim a reward, could recover it."

"LA CROSSE, September 20, 1882.

"*To C. J. Kershaw & Son, Milwaukee, Wis.:* Your letter of yesterday received and noted. You may ship me two thousand (2000) barrels Michigan fine salt, as offered in your letter. Answer.

"J. H. MOULTON."

TAYLOR, J. The only question presented is whether the appellant's letter, and the telegram sent by respondent in reply thereto, constitute a contract for the sale of 2000 barrels of Michigan fine salt by the appellants to the respondent, at the price named in such letter.

We are very clear that no contract was perfected by the order telegraphed by the respondent in answer to appellant's letter. The learned counsel for the respondent clearly appreciated the necessity of putting a construction upon the letter which is not apparent on its face, and in their complaint have interpreted the letter to mean that the appellants, by said letter, made an express offer to sell the respondent, on the terms stated, such reasonable amount of salt as he might order, and as the appellants might reasonably expect him to order, in response thereto. If in order to entitle the plaintiff to recover in this action it is necessary to prove these allegations, then it seems clear to us that the writings between the parties do not show the contract. It is not insisted by the learned counsel for the respondent that any recovery can be had unless a proper construction of the letter and telegram constitute a binding contract between the parties. The alleged contract being for the sale and delivery of personal property of a value exceeding $50, is void by the statute of frauds, unless in writing. § 2308 R. S. 1878.

The counsel for the respondent claims that the letter of the appellants is an offer to sell to the respondent, on the terms mentioned, any reasonable quantity of Michigan fine salt that he might see fit to order, not less than one car-load. On the other hand, the counsel for the appellants claim that the letter is not an offer to sell any specific quantity of salt, but simply a letter such as a business man would send out to customers or those with whom he desired to trade, soliciting their patronage. To give the letter of the appellants the construction claimed for it by the learned counsel for the respondent, would introduce such an element of uncertainty into the contract as would necessarily render its enforcement a matter of difficulty, and in every case the jury trying the case would be called upon to determine whether the quantity ordered was such as the appellants might reasonably expect from the party. This question would necessarily involve an inquiry into the nature and extent of the business of the person to whom the letter was addressed, as well as to the extent of the business of the appellants. So that it would be a question of fact for the jury in each case to determine whether there was a bind-

ing contract between the parties. And this question would not in any way depend upon the language used in the written contract, but upon the proofs to be made outside of the writings. As the only communications between the parties upon which a contract can be predicated are the letter and the reply of the respondent, we must look to them and nothing else, in order to determine whether there was a contract in fact. We are not at liberty to help out the written contract, if there be one, by adding by parol evidence additional facts to help out the writing, so as to make out a contract not expressed therein. If the letter of the appellants is an offer to sell salt to the respondent on the terms stated, then it must be held to be an offer to sell any quantity, at the option of the respondent, not less than one car-load. The difficulty and injustice of construing the letter into such an offer is so apparent that the learned counsel for the respondent do not insist upon it, and consequently insist that it ought to be construed as an offer to sell such a quantity as the appellants, from their knowledge of the business of the respondent, might reasonably expect him to order.

Rather than introduce such an element of uncertainty into the contract, we deem it much more reasonable to construe the letter as a simple notice to those dealing in salt that the appellants were in a condition to supply that article for the price named, and requesting the person to whom it was addressed to deal with them. This case is one where it is eminently proper to heed the injunction of Justice Foster in the opinion in Lyman v. Robinson (14 Allen, 254): "That care should always be taken not to construe as an agreement, letters which the parties intended only as preliminary negotiations."

We do not wish to be understood as holding that a party may not be bound by an offer to sell personal preperty, where the amount or quantity is left to be fixed by the person to whom the offer is made, when the offer is accepted and the amount or quantity fixed before the offer is withdrawn. We simply hold that the letter of the appellants in this case was not such an offer. If the letter had said to the respondent, we will sell you all the Michigan fine salt you will order, at the price and on the terms named, then it is undoubtedly the law that the appellants would have been bound to deliver any reasonable amount the respondent might have ordered,—possibly any amount,—or make good their default in damages. The case cited by the counsel, decided by the California Supreme Court (Keller v. Ybarru, 3 Cal. 147), was an offer of this kind with an additional limitation. The defendant in that case had a crop of growing grapes, and he offered to pick from the vines and deliver to the plaintiff, at defendant's vineyard, so many grapes then growing in said vineyard as the plaintiff should wish to take during the present year, at ten cents per pound on delivery. The plaintiff, within the time and before the offer was

withdrawn, notified the defendant that he wished to take 1900 pounds of his grapes on the terms stated. The court held there was a contract to deliver the 1900 pounds. In this case, the fixing of the quantity was left to the person to whom the offer was made, but the amount which the defendant offered, beyond which he could not be bound, was also fixed by the amount of grapes he might have in his vineyard in that year. The case is quite different in its facts from the case at bar.

The cases cited by the learned counsel for the appellants (Beaupré v. P. & A. Tel. Co., 21 Minn. 155, and Kinghorne v. Montreal Tel. Co., U. C. 18 Q. B. 60) are nearer in their main facts to the case at bar, and in both it was held there was no contract. We, however, place our opinion upon the language of the letter of the appellants, and hold that it cannot be fairly construed into an offer to sell to the respondent any quantity of salt he might order, nor any reasonable amount he might see fit to order. The language is not such as a business man would use in making an offer to sell to an individual a definite amount of property. The word "sell" is not used. They say, "We are authorized to offer Michigan fine salt," etc., and volunteer an opinion that at the terms stated it is a bargain. They do not say, we offer to sell to you. They use the general language proper to be addressed generally to those who were interested in the salt trade. It is clearly in the nature of an advertisement, or business circular, to attract the attention of those interested in that business to the fact that good bargains in salt could be had by applying to them, and not as an offer by which they are to be bound, if accepted, for any amount the persons to whom it was addressed might see fit to order. We think the complaint fails to show any contract between the parties, and the demurrer should have been sustained.

By the Court. The order of the Circuit Court is reversed and the cause remanded for further proceedings according to law.[1]

9 Cyc. 278–280 (83–92); W. P. 19 (18).

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[1] In Beaupré v. Telegraph Co., 21 Minn. 155, the court said: "The plaintiffs had written to Ryan, enquiring if he had any more pork of certain kinds, and requesting him to 'telegraph price on receipt of this.' Ryan accordingly telegraphed as follows: 'Letter received. No light mess here. Extra mess twenty-eight seventy-five (28.75).' Upon receipt of this dispatch, the plaintiffs sent this message, which the defendant neglected to deliver in due season: 'Dispatch received. Will take two hundred extra mess, price named.' Ryan's dispatch did not purport to be an offer to sell any quantity of pork whatever, nor was the plaintiff's message an acceptance of any offer. The seasonable delivery of the plaintiffs' message to Ryan would not have effected any contract binding him to deliver to the plaintiffs two hundred barrels, at the price named. Ryan's dispatch was rather (as it seems to be admitted by the plaintiffs in their printed argument) a quotation of the mar-

The offer must be intended to create, and capable of creating, legal relations.

KELLER *v.* HOLDERMAN.

11 MICHIGAN, 248.—1863.

Action on a three-hundred-dollar check which had been drawn by defendant in favor of plaintiff, on a bank which had refused to honor it. The facts concerning the check were, that it was given for a fifteen-dollar watch, which defendant kept until the day of trial, when he offered to return it, but plaintiff refused to receive it; that the whole transaction was a frolic and banter, the plaintiff not expecting to sell nor the defendant intending to buy the watch at the sum for which the check was drawn; and that the defendant when he drew the check had no money in the banker's hands, and had intended to insert a condition in the check that would prevent his being liable upon it, but had failed to do so. Judgment was rendered against him for the amount of the check, whereupon he appealed.

MARTIN, C. J. When the court below found as a fact that "the whole transaction between parties was a frolic and a banter, the plaintiff not expecting to sell nor the defendant intending to buy the watch at the sum for which the check was drawn," the conclusion should have been that no contract was ever made by the parties, and the finding should have been that no cause of action existed upon the check to the plaintiff.

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ket price of pork, or perhaps, a statement of the price at which he held his own pork; and the plaintiffs' message was an offer to take two hundred barrels at the price named—a mere order for goods, which Ryan might accept or reject at his pleasure, and until his acceptance no contract would exist between the parties."

In Baston v. Toronto Vinegar Co., 4 Ont. L. R. 20, the plaintiff, who had had previous dealings with the defendants, wrote to them on May 5th asking them if they were going to buy cucumbers that year, and what they were going to pay for them; adding, "please let me know as I want to make a contract with someone for them, as I want to put in quite a few this year." The defendants replied, "We are pleased to learn that you are going to do a lot of growing this year, and will be pleased to take all you grow at same price as last year. We will see you later on and make final arrangements." Nothing further occurred until the following August, when the plaintiff sent several loads of cucumbers to the defendants, who accepted them and paid for them, nothing being said at the time of any contract between the parties. *Held*, that the defendants' letter was not an offer open to acceptance by the plaintiff, or by the delivery of cucumbers to them by the plaintiff, but a statement of their readiness to enter into an agreement with the plaintiff upon terms to be arranged. (Syllabus.)

The judgment is reversed, with costs of this court and of the court below.

The other Justices concurred.[1]

9 Cyc. 276 (74–75); W. P. 3 (1).

McCLURG v. TERRY.

21 NEW JERSEY EQUITY, 225.—1870.

THE CHANCELLOR: The complainant seeks to have the ceremony of marriage performed between herself and the defendant in November, 1869, declared to be a nullity. The ground on which she asks this decree is, that although the ceremony was actually performed, and by a justice of the peace of the county, it was only in jest, and not intended to be a contract of marriage, and that it was so understood at the time by both parties, and the other persons present; and that both parties have ever since so considered and treated it, and have never lived together, or acted towards each other as man and wife. The bill and answer both state these as the facts of the case, and that neither party intended it as a marriage, or was willing to take the other as husband or wife. These statements are corroborated by the witnesses present. The complainant is an infant of nineteen years, and had returned late in the evening to Jersey City, from an excursion with the defendant and a number of young friends, among whom was a justice of the peace, and all being in good spirits, excited by the excursion, she in jest challenged the defendant to be married to her on the spot; he in the same spirit accepted the challenge, and the justice at their request performed the ceremony, they making the proper responses. The ceremony was in the usual and proper form, the justice doubting whether it was in earnest or in jest. The defendant escorted the complainant to her home, and left her there as usual on occasions of such excursions; both acted and treated the matter as if no ceremony had taken place. After some time the

[1] "The making of the offer to sell 20,000 barrels of flour at four dollars a barrel, at the same time when he actually bought 400 barrels, in good business earnest, at four dollars and forty-five cents a barrel, and the signing of a memorandum in writing of such a sale, was never regarded or intended by either party, as more than a mere bluff or banter without any serious intention that it should be performed as a real, bona fide contract. It was perfectly evident and was abundantly proved, that the defendant, who was a small retail dealer with limited means, was utterly unable to carry out such a contract, even if the flour could have been obtained in sufficient quantity, and was also unable, without a large advance in the price, to make deliveries at the rate of 400 barrels daily for fifty consecutive days."—Theiss v. Weiss, 166 Pa. St. 9.

friends of the complainant having heard of the ceremony, and that it had been formally and properly performed before the proper magistrate, raised the question and entertained doubts whether it was not a legal marriage; and the justice meditated returning a certificate of the marriage to be recorded before the proper officer. The bill seeks to have the marriage declared a nullity, and to restrain the justice from certifying it for record.

Mere words without any intention corresponding to them, will not make a marriage or any other civil contract. But the words are the evidence of such intention, and if once exchanged, it must be clearly shown that both parties intended and understood that they were not to have effect. In this case the evidence is clear that no marriage was intended by either party; that it was a mere jest got up in the exuberance of spirits to amuse the company and themselves. If this is so, there was no marriage. On this part of the case I have no difficulty.

. . . . . .

I am satisfied that this court has the power, and that this is a proper case to declare this marriage a nullity.

Acceptance must be absolute and identical with the terms of the offer.

MINNEAPOLIS AND ST. LOUIS RAILWAY *v.* COLUMBUS ROLLING MILL.

119 UNITED STATES, 149.—1886.

Mr. Justice Gray. The rules of law which govern this case are well settled. As no contract is complete without the mutual assent of the parties, an offer to sell imposes no obligation until it is accepted according to its terms. So long as the offer has been neither accepted nor rejected, the negotiation remains open, and imposes no obligation upon either party; the one may decline to accept, or the other may withdraw his offer; and either rejection or withdrawal leaves the matter as if no offer had ever been made. A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested. The other party, having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it. Eliason v. Henshaw, 4 Wheat. 225; Carr v. Duval, 14 Pet. 77; National Bank v. Hall, 101 U. S. 43, 50; Hyde v. Wrench, 3 Beavan, 334; Fox v. Turner, 1 Bradwell, 153. If the offer does not limit the time for its acceptance, it must be accepted within a reasonable time. If it does, it may, at any time within the limit and so long as it remains open,

be accepted or rejected by the party to whom, or be withdrawn by the party by whom, it was made. Boston & Maine Railroad v. Bartlett, 3 Cush. 224; Dickinson v. Dodds, 2 Ch. D. 463.

The defendant, by the letter of December 8, offered to sell to the plaintiff two thousand to five thousand tons of iron rails on certain terms specified, and added that if the offer was accepted the defendant would expect to be notified prior to December 20. This offer, while it remained open, without having been rejected by the plaintiff or revoked by the defendant, would authorize the plaintiff to take at his election any number of tons not less than two thousand nor more than five thousand, on the terms specified. The offer, while unrevoked, might be accepted or rejected by the plaintiff at any time before December 20. Instead of accepting the offer made, the plaintiff, on December 16, by telegram and letter, referring to the defendant's letter of December 8, directed the defendant to enter an order for twelve hundred tons on the same terms. The mention, in both telegram and letter, of the date and the terms of the defendant's original offer, shows that the plaintiff's order was not an independent proposal, but an answer to the defendant's offer, a qualified acceptance of that offer, varying the number of tons, and therefore in law a rejection of the offer. On December 18, the defendant by telegram declined to fulfill the plaintiff's order. The negotiation between the parties was thus closed, and the plaintiff could not afterwards fall back on the defendant's original offer. The plaintiff's attempt to do so, by the telegram of December 19, was therefore ineffectual and created no rights against the defendant.

Such being the legal effect of what passed in writing between the parties, it is unnecessary to consider whether, upon a fair interpretation of the instructions of the court, the question whether the plaintiff's telegram and letter of December 16 constituted a rejection of the defendants' offer of December 8 was ruled in favor of the defendant as matter of law, or was submitted to the jury as a question of fact. The submission of a question of law to the jury is no ground of exception if they decide it aright. Pence v. Langdon, 99 U. S. 578.

Judgment affirmed.

9 Cyc. 265–270 (22–53); W. P. 30 (34).

BAKER *v.* HOLT.

56 WISCONSIN, 100.—1882.

Appeal from the Circuit Court for Wood County.

TAYLOR, J. This action is brought to compel the specific performance of a contract for the sale of real estate which the plaintiff claimed he had purchased from the defendant. The plaintiff resided at Cen-

tralia, in this State, and the defendant at Hartford, Conn. The contract, if any, was made by correspondence through the mail. The following are copies of the letters and telegram which plaintiff claims made the contract of sale:

"HARTFORD, CONN., October 24, 1881.

"C. O. BAKER.

"*Dear Sir:* Your letter came to hand a few days ago, but I have delayed answering it owing to my being sick. In regard to my land, I have had letters from one or two other parties within a month wanting to buy it. I have told them I was not ready to sell yet, but if you want to buy now I will tell you just what I will do. I will sell the whole 120 acres for $800; one fourth cash down, and the balance in three equal notes, payable in one, two, and three years, with interest at 6 per cent. The notes to be secured by mortgage back on the land. This is my offer, if you want it now. I would not agree to keep the offer good a great while. I remain very truly yours,

"THOMAS R. HOLT,
"29 Benton Street, Hartford, Conn."

"CENTRALIA, WIS., November 7, 1881.

"THOMAS R. HOLT, Esq., Hartford, Conn.

"*Dear Sir:* Yours of October 24th is at hand and contents noted. I will take your land at the figures named and upon the terms mentioned in your letter—$800 for the 120 acres; $200 on receipt of deed and $600 in three annual payments of $200 each, with interest at 6 per cent; security back on the land. You may make out the deed, leaving the name of the grantee in blank, and forward the same to I. L. Mosher, Esq., county treasurer of Wood County, at Grand Rapids, Wis., or to your agent, if you have one here, to be delivered to me on payment of the $200 and the delivery of the necessary security. You will confer a favor by notifying me whether you still hold your offer good, and to whom you will send the deed, at your earliest convenience.

"Yours truly,

"C. O. BAKER."

"CENTRALIA, WIS., November 10, 1881.

"THOMAS R. HOLT, 29 Benton Street:

"Have written you, will take land at your figures. Answer.

"C. O. BAKER."

The evidence shows that it takes four days to transmit by mail a letter from Centralia to Hartford, and the same time from Hartford to Centralia. It also shows that on November 10th, and before he received the letter of plaintiff, dated the 7th of the same month, and before the telegram was received, the defendant wrote again to the plaintiff, notifying him that he had concluded not to sell the land at the price named in his letter of October 24th, and that after the receipt by the plaintiff of defendant's letter of November 10th, and on

the 14th of said month, plaintiff wrote and mailed to the defendant the following letter:

"CENTRALIA, WIS., November 14, 1881.

"THOMAS R. HOLT, Hartford, Conn.:

"*Dear Sir:* Yours of November 10th is at hand and contents noted. Will you make me your *lowest* cash offer on your land, to hold good at least twenty days, that I may have time in which to signify my acceptance of the offer, if considered reasonable; $800 is about all the land is worth, and I would not give much more for it. Let me hear from you by return mail, and oblige, yours truly, C. O. BAKER."

The answer of the defendant admitted all the facts above stated, and for the purposes of this case it is also presumed that the answer admits that the plaintiff wrote the defendant a letter of inquiry, as stated in his complaint, in which letter the lands of the defendant were properly described as alleged in said complaint. The plaintiff demurred to the answer on the ground that it did not state facts sufficient to constitute a defense. The Circuit Court sustained the demurrer, and from the order sustaining the same the defendant appeals to this Court. This ruling can only be sustained upon the ground that the plaintiff's letter of November 7th was an unqualified acceptance of the offer to sell made by the defendant in his letter of October 24th, or that the telegram of November 10th was such an acceptance.

We are of the opinion that the Court erred in construing the letter of November 7th as an unqualified acceptance of the defendant's offer, and that the two letters constituted a binding contract of sale. The defendant's offer entitled him to have the money paid to him at Hartford, and the notes and mortgage delivered there, and to deliver his deed there and not in Centralia, or any other place in Wisconsin. This construction of the defendant's letter is not controverted by the learned counsel for the respondent; but he insists that what is said in the plaintiff's letter about sending the deed to the treasurer of Wood County, or his agent in said county, if he had one, executed in blank as to the name of the grantee, and the payment of the money and the delivery of the notes and mortgage to his agent in said county, is merely suggested as a convenient way of carrying out the agreement, and not as conditions of his acceptance of the offer. We think the letter of the plaintiff is not susceptible of the construction given it by the learned counsel. We are clearly of the opinion that the defendant could not have compelled the plaintiff to perform the contract on his part unless he had remitted the deed to the treasurer of Wood County, or to some agent appointed by him there, executed in blank as to the grantee, and have demanded the payment of the money and the delivery of the security there, and not at his residence at Hartford, Conn. We are unable to distinguish this case from the case of the North-

western Iron Co. v. Mead, 21 Wis. 474; and it is clearly distinguishable from the case of Matteson v. Scofield, 27 Wis. 671.

In the case last cited, the purchaser, in his letter of acceptance, states that he has deposited the money in a bank in Milwaukee, and requested the deed to be sent to the bank for him; but he adds: "I suggest this method of making the transfer, as it saves time and expense." This statement in the letter of acceptance shows that it was not intended to qualify his previous unconditional acceptance of the vendor's offer, and in addition the vendor acknowledged the receipt of the letter of acceptance and made no objection to it in any way, nor did he withdraw his offer, but stated that he had made up his mind to come to Hudson and do the business in person. In the case at bar the defendant waived nothing; and, in fact, before he received the plaintiff's letter of acceptance wrote another letter withdrawing his offer. It is probably true that he could not withdraw his offer so as to bind the plaintiff if the plaintiff had in proper time mailed his letter to defendant containing an unqualified acceptance of his offer. But this letter of the defendant withdrawing his offer is proper evidence tending to show that he waived none of the terms of his original offer. The telegram was no more an absolute acceptance than the letter. It refers to the letter as containing plaintiff's acceptance of his offer, and if that letter is not an unconditional acceptance the telegram does not help it.

We think there was another question in the case—viz., Was the acceptance made in time? The defendant's letter clearly intimated that he required an immediate reply to his offer. He notifies the plaintiff that he has inquiries for the land from other parties, and that if plaintiff wants to buy now he will sell, etc. The plaintiff must have received the defendant's letter as early as October 28th or 29th, and he did not write his letter of acceptance until November 7th, either nine or ten days after its receipt, and in this letter the plaintiff seems to entertain a doubt as to whether his letter of acceptance was in time, and closes it with the following inquiry: "You will confer a favor by notifying me whether you still hold your offer good, and to whom you will send your deed, at your earliest convenience." We have serious doubts whether the letter of acceptance was mailed in time; but we prefer to put our decision upon the ground that the letter was not an unconditional acceptance of the defendant's offer.

For the reason stated, the Court erred in sustaining the demurrer to the defendant's answer.

By the Court. The order of the Circuit Court is reversed, and the cause remanded for further proceedings according to law.[1]

9 Cyc. 265 (22); 267 (33); W. P. 43 (47).

[1] In Neufville v. Stuart, 1 Hill Ch. (S. C.) 159, the defendant in a letter to the plaintiff's agent, proposed to purchase a plantation at eight thousand

Execution of written contract contemplated.

SANDERS *v.* POTTLITZER BROS. FRUIT CO.

144 NEW YORK, 209.—1894.

Action by Archie D. Sanders and others against Pottlitzer Bros. Fruit Company for damages for breach of a contract of sale. From a judgment of the general term affirming a judgment in favor of defendant, plaintiffs appeal.

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dollars—six thousand dollars in cash, and two thousand dollars in January following, and requested an immediate answer; the agent, by return post replied, accepting the proposal, but added that he presumed the two thousand dollars were to bear interest from the date. The court said: "The proposition of the defendant to buy, is distinctly and in terms accepted, upon the terms which she stated. The agent, in another part of his letter, speaking of the execution of titles, the cash payment, and the security for the payment to be made in January, 1832, in reference to the letter, says 'I presume with interest.' These words were obviously used as his construction of the contract which he had accepted, and which he supposed the defendant to have intended by her offer. But they are not made a condition on which the acceptance is to depend. It is what in common fairness and in the usual course of such contracts, he supposed the defendant to have intended; still, however, leaving it perfectly optional to the defendant to admit or deny his construction, without affecting the legal effect of the contract, which he had accepted in such terms, and so unconditionally as to prevent the plaintiff from refusing to comply with it."

In Culton v. Gilchrist, 92 Ia. 718, plaintiff answered a proposition to lease, "I will accept your offer to lease to you at $200 per year for three or five years as you choose." Defendant answered, "make out lease for place for five years at $200 per year." He also said in this letter that he would like to build on a cookroom, with privilege to remove it. Plaintiff recognized that a lease for five years existed. *Held*, these letters made a lease, and the request as to the cookroom did not attach a condition to defendant's acceptance. (Syllabus.)

In Turner v. McCormick, 56 W. Va. 161, 173, the court says that a review of authorities bearing upon the question of unconditional acceptance "seems to establish the following propositions: First—A request for a change or modification of a proposed contract, made before an acceptance thereof, amounts to a rejection of it. Second—A mere inquiry as to whether the proposer will alter or modify its terms, made before acceptance or rejection, does not amount to a rejection, and if the offer be not withdrawn before acceptance made within a reasonable time, the offer becomes a binding contract. Third—A request, suggestion or proposal of alteration or modification, made after unconditional acceptance, and not assented to the opposite party, does not affect the contract put in force and effect by the acceptance, nor amount to a breach thereof, giving right of rescission. Fourth—Acceptance of a formal and carefully prepared option of sale of land, within the time allowed by it, and according to its terms, although accompanied by a request for a de-

O'BRIEN, J. The plaintiffs in this action sought to recover damages for the breach of a contract for the sale and delivery of a quantity of apples. The complaint was dismissed by the referee, and his judgment was affirmed upon appeal. The only question to be considered is whether the contract stated in the complaint, as the basis for damages, was ever in fact made, so as to become binding upon the parties. On the 28th of October, 1891, the plaintiffs submitted to the defendant the following proposition in writing:

"BUFFALO, N. Y., *Oct.* 28, 1891.

"Messrs. Pottlitzer Bros. Fruit Co., Lafayette, Ind.—

"Gentlemen: We offer you ten car loads of apples, to be from 175 to 200 barrels per car, put up in good order, from stock inspected by your Mr. Leo Pottlitzer at Nunda and Silver Springs. The apples not to exceed one-half green fruit, balance red fruit, to be shipped as follows: First car between 1st and 15th December, 1891; second car between 15th and 30th December, 1891; and one car each ten days after January 1, 1892, until all are shipped. Dates above specified to be considered as approximate a few days either way, at the price of $2.00 per barrel, free on board cars at Silver Springs and Nunda, in refrigerator cars; this proposition to be accepted not later than the 31st inst., and you to pay us $500 upon acceptance of the proposition, to be deducted from the purchase price of apples at the rate of $100 per car on the last five cars.

"Yours respectfully,
"J. SANDERS & SON."

To this proposition the defendant replied by telegraph on October 31st as follows:

"LAFAYETTE, IND., 31*st October*.

"J. Sanders & Son:

"We accept your proposition on apples, provided you will change it to read car every eight days from January first, none in December; wire acceptance.
"POTTLITZER BROS. FRUIT CO."

On the same day the plaintiffs replied to this dispatch, to the effect that they could not accept the modification proposed, but must insist upon the original offer. On the same day the defendant answered the plaintiff's telegram as follows:

"Can only accept condition as stated in last message. Only way we can accept. Answer if accepted. Mail contract, and we will then forward draft.
"POTTLITZER BROS. FRUIT CO."

The matter thus rested till November 4th, when the plaintiffs received the following letter from the defendant:

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parture from its terms as to the time and place of performance, is an unconditional acceptance and converts the option into an executory contract of sale, provided the request be not so worded as to limit or qualify the acceptance."

"LAFAYETTE, IND., *November* 2, 1891.

"J. Sanders & Son, Stafford, N. Y.—

"Gents: We are in receipt of your telegrams, also your favor of the 31st ult. While we no doubt think we have offered you a fair contract on apples, still the dictator of this has learned on his return home that there are so many near-by apples coming into market that it will affect the sale of apples in December, and therefore we do not think it advisable to take the contract unless you made it read for shipment from the 1st of January. We are very sorry you cannot do this, but perhaps we will be able to take some fruit from you, as we will need it in the spring. If you can change the contract so as to read as we wired you we will accept it and forward you draft in payment on same.

"POTTLITZER BROS. FRUIT CO."

On receipt of this letter the plaintiffs sent the following message to the defendant by telegraph:

November 4th.

"Pottlitzer Brothers Fruit Company, Lafayette, Ind.—

"Letter received. Will accept conditions. If satisfactory, answer, and will forward contract.

"J. SANDERS & SON."

The defendant replied to this message by telegraph saying:

"All right. Send contract as stated in our message."

The plaintiffs did prepare and send on the contract precisely in the terms embraced in the foregoing correspondence, which was the original proposition made by the plaintiffs, as modified by defendant's telegram above set forth, and which was acceded to by the plaintiffs. This was not satisfactory to the defendant, and it returned it to the plaintiffs with certain modifications, which were not referred to in the correspondence. These modifications were: (1) That the fruit should be well protected from frost and well hayed; (2) that if, in the judgment of the plaintiffs, it was necessary or prudent that the cars should be fired through, the plaintiffs should furnish the stoves for the purpose, and the defendant pay the expense of the man to be employed in looking after the fires to be kept in the cars; (3) that the plaintiffs should line the cars in which the fruit was shipped. These conditions were more burdensome, and rendered the contract less profitable to the plaintiffs. They were not expressed in the correspondence and I think cannot be implied. They were not assented to by the plaintiffs, and on their declining to incorporate them in the paper the defendant treated the negotiations as at an end and notified the plaintiffs that it had placed its order with other parties. There was some further correspondence but it is not material to the question presented by the appeal.

The writings and telegrams that passed between the parties contain all the elements of a complete contract. Nothing was wanting

in the plaintiffs' original proposition but the defendant's assent to it in order to constitute a contract binding upon both parties according to its terms. This assent was given upon condition that a certain specified modification was accepted. The plaintiffs finally assented to the modification, and called upon the defendant to signify its assent again to the whole arrangement as thus modified, and it replied that it was "all right," which must be taken as conclusive evidence that the minds of the parties had met and agreed upon certain specified and distinct obligations which were to be observed by both.

It is true, as found by the learned referee, that the parties intended that the agreement should be formally expressed in a single paper, which, when signed, should be the evidence of what had already been agreed upon. But neither party was entitled to insert in the paper any material condition not referred to in the correspondence, and if it was inserted without the consent of the other party it was unauthorized. Hence the defendant, by insisting upon further material conditions, not expressed or implied in the correspondence, defeated the intention to reduce the agreement to the form of a single paper signed by both parties. The plaintiffs then had the right to fall back upon their written proposition, as originally made, and the subsequent letters and telegrams; and, if they constituted a contract of themselves, the absence of the formal agreement contemplated was not, under the circumstances, material.

When the parties intend that a mere verbal agreement shall be finally reduced to writing, as the evidence of the terms of the contract, it may be true that nothing is binding upon either party until the writing is executed. But here the contract was already in writing, and it was none the less obligatory upon both parties because they intended that it should be put into another form, especially when their intention is made impossible by the act of one or the other of the parties by insisting upon the insertion of conditions and provisions not contemplated or embraced in the correspondence. Vassar v. Camp, 11 N. Y. 441; Brown v. Norton, 50 Hun, 248; Pratt v. Railroad Co., 21 N. Y. 308. The principle that governs in such cases was clearly stated by Judge Selden in the case last cited, in these words: "A contract to make and execute a certain written agreement, the terms of which are mutually understood and agreed upon, is, in all respects, as valid and obligatory, where no statutory objection interposes, as the written contract itself would be, if executed. If, therefore, it should appear that the minds of the parties had met; that a proposition for a contract had been made by one party and accepted by the other; that the terms of this contract were in all respects definitely understood and agreed upon, and that a part of the mutual understanding was that a written contract embodying these terms

should be drawn and executed by the respective parties,—this is an obligatory contract, which neither party is at liberty to refuse to perform."

In this case it is apparent that the minds of the parties met, through the correspondence, upon all the terms, as well as the subject-matter, of the contract, and that the subsequent failure to reduce this contract to the precise form intended, for the reason stated, did not affect the obligations of either party, which had already attached, and they may now resort to the primary evidence of their mutual stipulations. Any other rule would always permit a party who has entered into a contract like this, through letters and telegraphic messages, to violate it whenever the understanding was that it should be reduced to another written form, by simply suggesting other and additional terms and conditions. If this were the rule the contract would never be completed in cases where, by changes in the market, or other events occuring subsequent to the written negotiations, it became the interest of either party to adopt that course in order to escape or evade obligations incurred in the ordinary course of commercial business. A stipulation to reduce a valid written contract to some other form cannot be used for the purpose of imposing upon either party additional burdens or obligations, or of evading the performance of those things which the parties have mutually agreed upon by such means as made the promise or assent binding in law. There was no proof of any custom existing between the shippers and consignees of such property in regard to the payment of the expense of firing, lining, and haying the cars. If it be said that such precautions are necessary in order to protect the property while in transit, that does not help the defendant. The question still remains, who was to bear the expense? The plaintiffs had not agreed to pay it, any more than they had agreed to pay the freight or incur the other expenses of transportation. The plaintiffs sent a plain proposition which the defendant accepted without any such conditions as it subsequently sought to attach to it. That the parties intended to make and sign a final paper does not warrant the inference that they also intended to make another and different agreement. The defendant is in no better position than it would be in case it had refused to sign the final writing without alleging any reasons whatever.

The principle, therefore, which is involved in the case, is this: Can parties who have exchanged letters and telegrams with a view to an agreement, and have arrived at a point where a clear and definite proposition is made on the one side and accepted on the other, with an understanding that the agreement shall be expressed in a formal writing, ever be bound until that writing is signed? If they are at liberty to repudiate the proposition or acceptance, as the case may be, at any time before the paper is signed, and as the market may go up

or down, then this case is well decided. But if, at the close of the correspondence, the plaintiffs became bound by their offer, and the defendant by its acceptance of that offer, whether the final writing was signed or not, as I think they did, under such circumstances as the record discloses, then the conclusion of the learned referee was erroneous. To allow either party to repudiate the obligations clearly expressed in the correspondence, unless the other will assent to material conditions, not before referred to, or to be implied from the transaction, would be introducing an element of confusion and uncertainty into the law of contract. If the parties did not become bound in this case, they cannot be bound in any case until the writing is executed.

The judgment should be reversed, and a new trial granted, costs to abide the event.

All concur, except EARL, GRAY, and BARTLETT, JJ., dissenting.

Judgment reversed.

9 Cyc. 280–282 (93–99); 267 (33). 29 L. R. A. 431; W. P. 47 (53); 8 H. L. R. 498.

CHAPTER II.

Form and Consideration.

Contracts of record.

O'BRIEN, late sheriff, *v.* YOUNG *et al.*

95 NEW YORK, 428.—1884.

Appeal from order of the General Term of the Supreme Court, in the first judicial department, made January 8, 1884, which affirmed an order of Special Term, denying a motion to restrain the sheriff of the county of New York from collecting, upon a judgment issued to him herein, interest at a greater rate than six per cent after January 1, 1880.

Judgment was perfected against the defendants February 10, 1877, at which time the legal rate of interest in the State was seven per cent. By Chap. 538 of the laws of 1879 the legal rate of interest was reduced from seven to six per cent, the act to go into effect January 1, 1880. Execution on the judgment was issued to the sheriff November 19, 1883, instructing him to collect the amount thereof with interest at the rate of seven per cent from the date of the entry of judgment, February 10, 1877.

Earl, J. By the decided weight of authority in this State, where one contracts to pay a principal sum at a certain future time with interest, the interest prior to the maturity of the contract is payable by virtue of the contract, and thereafter as damage for the breach of the contract. Macomber v. Dunham, 8 Wend. 550; United States Bank v. Chapin, 9 Id. 471; Hamilton v. Van Rensselaer, 43 N. Y. 244; Ritter v. Phillips, 53 Id. 586; Southern Central R. R. Co. v. Town of Moravia, 61 Barb. 180. And such is the rule as laid down by the Federal Supreme Court. Brewster v. Wakefield, 22 How. (U. S.) 118; Burnhisel v. Firman, 22 Wall. 170; Holden v. Trust Co., 100 U. S. 72.

The same authorities show that after the maturity of such a contract, the interest is to be computed as damages according to the rate prescribed by the law, and not according to that prescribed in the contract if that be more or less.

But when the contract provides that the interest shall be at a specified rate until the principal shall be paid, then the contract rate governs until payment of the principal or until the contract is merged

in a judgment. And where one contracts to pay money on demand "with interest," or to pay money generally "with interest," without specifying time of payment, the statutory rate then existing becomes the contract rate, and must govern until payment or at least until demand and actual default, as the parties must have so intended. Paine v. Caswell, 68 Me. 80; 28 Am. Rep. 21; Eaton v. Boissonnault, 67 Me. 540; 24 Am. Rep. 52.

If, therefore, this judgment, the amount of which is by its terms payable with interest, is to be treated as a contract—as a bond executed by the defendants at its date—then the statutory rate of interest existing at the date of the rendition of the judgment is to be treated as part of the contract and must be paid by the defendants according to the terms of the contract, and thus the plaintiff's contention is well founded.

But is a judgment, properly speaking, for the purposes now in hand, a contract? I think not. The most important elements of a contract are wanting. There is no *aggregatio mentium.* The defendant has not voluntarily assented. All the authorities assert that the existence of parties legally capable of contracting is essential to every contract, and yet they nearly all agree that judgments entered against lunatics and others incapable in law of contracting are conclusively binding until vacated or reversed. In Wyman v. Mitchell (1 Cowen, 316), Sutherland, J., said that "a judgment is in no sense a contract or agreement between the parties." In McCoun v. The New York Central and Hudson River Railroad Company (50 N. Y. 176), Allen, J., said that "a statute liability wants all the elements of a contract, consideration and mutuality as well as the assent of the party. Even a judgment founded upon contract is no contract." In Bidleson v. Whytel (3 Burrows, 1545–1548) it was held after great deliberation and after consultation with all the judges, Lord Mansfield speaking for the court, "that a judgment is no contract, nor can be considered in the light of a contract, for *judicium redditur in invitum.*" To the same effect are the following authorities: Rae v. Hulbert, 17 Ill. 572; Todd v. Crumb, 5 McLean, 172; Smith v. Harrison, 33 Ala. 706; Masterson v. Gibson, 56 Id. 56; Keith v. Estill, 9 Port. 669; Larrabee v. Baldwin, 35 Cal. 156; *In re* Kennedy, 2 S. C. (N. S.) 226; State of Louisiana v. City of New Orleans, 109 U. S. Sup. Ct. 285.

But in some decided cases, and in text-books, judges and jurists have frequently, and, as I think, without strict accuracy, spoken of judgments as contracts. They have been classified as contracts with reference to the remedies upon them. In the division of actions into *ex contractu* and *ex delicto,* actions upon judgments have been assigned to the former class. It has been said that the law of contracts, in its widest extent, may be regarded as including nearly all

the law which regulates the relations of human life; that contract is co-ordinate and commensurate with duty; that whatever it is the duty of one to do he may be deemed in law to have contracted to do, and that the law presumes that every man undertakes to perform what reason and justice dictate he should perform. 1 Pars. on Cont. (6th ed.) 3; 2 Black. Com. 443; 3 Id. 160; McCoun v. N. Y. C. & H. R. R. R. Co., *supra*. Contracts in this wide sense are said to spring from the relations of men to each other and to the society of which they are members. Blackstone says: "It is a part of the original contract entered into by all mankind who partake the benefits of society, to submit in all points to the municipal constitutions and local ordinances of that State of which each individual is a member." In the wide sense thus spoken of, the contracts are mere fictions invented mainly for the purpose of giving and regulating remedies. A man ought to pay for services which he accepts, and hence the law implies a promise that he will pay for them. A man ought to support his helpless children, and hence the law implies a promise that he will do so. So one ought to pay a judgment rendered against him, or a penalty which he has by his misconduct incurred, and hence the law implies a promise that he will pay. There is no more contract to pay the judgment than there is to pay the penalty. He has neither promised to pay the one nor the other. The promise is a mere fiction, and is implied merely for the purpose of the remedy. Judgments and penalties are, in the books, in some respects, placed upon the same footing. At common law both could be sued for in an action *ex contractu* for debt, the action being based upon the implied promise to pay. But no one will contend that a penalty is a contract, or that one is really under a contract liability to pay it. McCoun v. N. Y. C. & H. R. R. R. Co., *supra*.

Suppose a statute gives a penalty to an aggrieved party, with interest, what interest could he recover? The interest allowed by law when the penalty accrued, if the statutory rate has since been altered? Clearly not. He would be entitled to the interest prescribed by law during the time of the defendant's default in payment. There would, in such a case, be no contract to pay interest, and the statutory rate of interest at the time the penalty accrued would become part of no contract. If, therefore, a subsequent law should change the rate of interest, no vested right would be interfered with, and no contract obligation would be impaired.

The same principles apply to all implied contracts. When one makes a valid agreement to pay interest at any stipulated rate, for any time, he is bound to pay it, and no legislative enactment can release him from his obligation. But in all cases where the obligation to pay interest is one merely implied by the law, or is imposed by law, and there is no contract to pay except the fictitious one which the

law implies, then the rate of interest must at all times be the statutory rate. The rate existing at the time the obligation accrued did not become part of any contract, and hence the law which created the obligation could change or alter it for the future without taking away a vested right or impairing a contract.

In the case of all matured contracts which contain no provision for interest after they are past due, as I have before said, interest is allowed, not by virtue of the contract, but as damages for the breach thereof. In such cases what would be the effect of a statute declaring that no interest should be recovered? As to the interest which had accrued as damages before the date of the law, the law could have no effect because that had become a vested right of property which could not be taken away. But the law could have effect as to the subsequent interest, and in stopping that from running would impair no contract. A law could be passed providing that in all cases of unliquidated claims which now draw no interest, interest should thereafter be allowed as damages; and thus there is ample legislative power in such cases to regulate the future rate of interest without invading any constitutional right. When a man's obligation to pay interest is simply that which the law implies, he discharges that obligation by paying what the law exacts.

This judgment, so far as pertains to the question we are now considering, can have no other or greater force than if a valid statute had been enacted requiring the defendant to pay the same sum with interest. Under such a statute, interest would be computed, not at the rate in force when the statute was enacted, but according to the rate in force during the time of default in payment. A different rule would apply if a judgment or statute should require the payment of a given sum with interest at a specified rate. Then interest at the rate specified would form part of the obligation to be discharged.

Here, then, the defendant did not in fact contract or promise to pay this judgment, or the interest thereon. The law made it his duty to pay the interest, and implied a promise that he would pay it. That duty is discharged by paying such interest as the law, during the time of default in paying the principal sum, prescribed as the legal rate.

If this judgment had been rendered at the date the execution was issued, interest would have been computed upon the original demand at seven per cent to January 1, 1880, and then at the rate of six per cent. Shall the plaintiff have a better position because the judgment was rendered prior to 1880?

As no intention can be imputed to the parties in reference to the clause in the judgment requiring payment "with interest," we may inquire what intention the court had. It is plain that it could have

had no other intention than that the judgment should draw the statutory interest until payment. It cannot be presumed that the court intended that the interest should be at the rate of seven per cent if the statutory rate should become less.

That there is no contract obligation to pay the interest upon judgments which is beyond legislative interference is shown by legislation in this country and in England. Laws have been passed providing that all judgments should draw interest, and changing the rate of interest upon judgments, and such laws have been applied to judgments existing at their date, and yet it was never supposed that such laws impaired the obligation of contracts.

It is claimed that the provision in section 1 of the act of 1879, which reduced the rate of interest (Chap. 538), saves this judgment from the operation of that act. The provision is that "nothing herein contained shall be so construed as to in any way affect any contract or obligation made before the passage of this act." The answer to this claim is that here there was no contract to pay interest at any given rate. The implied contract, as I have shown, was to pay such interest as the law prescribed, and that contract is not affected or interfered with.

The foregoing was written as my opinion in the case of Prouty v. Lake Shore and Michigan Southern Railway Company. The only difference between that case and this is that there the judgment was by its terms payable "with interest." Here the judgment contains no direction as to interest. The reasoning of the opinion is applicable to this case and is, therefore, read to justify my vote in this. Since writing the opinion, we have decided, in the case of Sanders v. Lake Shore and Michigan Southern Railway Company, the law to be as laid down in the first paragraph of the opinion.

The orders of the General and Special Terms should be reversed and the motion granted, without costs in either court, the parties having so stipulated.

RUGER, C. J., and FINCH, J., concur with EARL and ANDREWS, JJ.; MILLER and DANFORTH, JJ., dissent.

Orders reversed and motion granted.

23 Cyc. 673–674 (39–41); 9 H. L. R. 158.

Contract under seal.

(*i.*) *What constitutes a seal.*

LORAH v. NISSLEY.

156 PENNSYLVANIA STATE, 329.—1893.

Rule to open judgment entered on a note alleged to be under seal. The word "seal," following the signature of the maker, was printed. The court below held that the note was not under seal and made absolute the rule to open the judgment, so as to permit the defendant to plead the statute of limitations.

MITCHELL, J. The days of actual sealing of legal documents, in its original sense of the impression of an individual mark or device upon wax or wafer, or even on the parchment or paper itself, have long gone by. It is immaterial what device the impression bears (Alexander v. Jameson, 5 Bin. 238), and the same stamp may serve for several parties in the same deed. Not only so, but the use of wax has almost entirely—and, even of wafers, very largely—ceased. In short, sealing has become constructive, rather than actual, and is in a great degree a matter of intention. It was said more than a century ago in McDill's Lessee v. McDill, 1 Dall. 63, that the "the signing of a deed is now the material part of the execution. The seal has become a mere form, and a written or ink seal, as it is called, is good." And in Long v. Ramsay, 1 Serg. & R. 72, it was said by Tilghman, C. J., that a seal with a flourish of the pen "is not now to be questioned." Any kind of flourish or mark will be sufficient, if it be intended as a seal. "The usual mode," said Tilghman, C. J., in Taylor v. Glaser, 2 Serg. & R. 502, "is to make a circular, oval, or square mark opposite to the name of the signer, but the shape is immaterial." Accordingly, it was held in Hacker's Appeal, 121 Pa. St. 192, 15 Atl. Rep. 500, that a single horizontal dash, less than an eighth of an inch long, was a sufficient seal, the context and the circumstances showing that it was so intended. On the other hand, in Taylor v. Glaser, *supra,* a flourish was held not a seal, because it was put under, and apparently intended merely as a part of, the signature. So, in Duncan v. Duncan, 1 Watts, 322, a ribbon inserted through slits in the parchment, and thus carefully prepared for sealing, was held not a seal, because the circumstances indicated the intent to use a well-known mode of sealing, by attaching the ribbon to the parchment with wax or wafer, and the intent had not been carried out.

These decisions establish beyond question that any flourish or mark, however irregular or inconsiderable, will be a good seal, if so intended; and, a fortiori, the same result must be produced by

writing the word "seal," or the letters "L. S.," meaning originally "locus sigilli," but now having acquired the popular force of an arbitrary sign for a seal, just as the sign "&" is held and used to mean "and" by thousands who do not recognize it as the Middle Ages manuscript contraction for the Latin "et."

If, therefore, the word "seal" on the note in suit had been written by Nissley after his name, there could have been no doubt about its efficacy to make a sealed instrument. Does it alter the case any that it was not written by him, but printed beforehand? We cannot see any good reason why it should. Ratification is equivalent to antecedent authority, and the writing of his name to the left of the printed word, so as to bring the latter into the usual and proper place for a seal, is ample evidence that he adopted the act of the printer in putting it there for a seal. The note itself was a printed form, with blank spaces for the particulars to be filled in, and the use of it raises a conclusive presumption that all parts of it were adopted by the signer, except such as were clearly struck out or intended to be canceled before signing. The pressure of business life and the subdivision of labor, in our day, have brought into use many things ready-made by wholesale, which our ancestors made singly for each occasion, and among others the conveniences of printed blanks for the common forms of written instruments. But even in the early days of the century the act of sealing was commonly done by adoption and ratification, rather than as a personal act, as we are told by a very learned and experienced, though eccentric, predecessor, in language that is worth quoting, for its quaintness: "'Illi robur et aes triplex.' He was a bold fellow who first in these colonies, and particularly in Pennsylvania, in time whereof the memory of man runneth not to the contrary, substituted the appearance of a seal by the circumflex of a pen, which has been sanctioned by usage and the adjudication of the courts as equipollent with a stamp containing some effigies or inscription on stone or metal. . . . How could a jury distinguish the hieroglyphic or circumflex of a pen by one man from another? In fact, the circumflex is usually made by the scrivener drawing the instrument, and the word 'seal' inscribed within it." Brackenridge, J., in Alexander v. Jameson, 5 Bin. 238, 244.

We are of opinion that the note in suit was duly sealed. We have not derived much light from the decisions in other states, but, so far as we have found any analogous cases, they are in harmony with the views herein expressed. In Whitley v. Davis, 1 Swan, (Tenn.) 333, the word "seal," without any scroll, was held to be a good seal, even to a public deed by the clerk of a court, he stating in the certificate that no seal of office had been provided. And in Lewis v. Overby, 28 Gratt. (Va.) 627, the word "seal," without any scroll, was held a good seal, within a statute enacting that "any writing

to which the person making it shall affix a scroll by way of seal shall be of the same force as if it were actually sealed." The learned court below, and the counsel for appellee, placed much reliance on the decision in Bennett v. Allen, 10 Pa. Co. Ct. R. 256. In that case the signature was placed to the left of, but below, the printed letters "L. S.," and it is said in the opinion that there was a space of half an inch between. The decision might possibly be sustained on the ground that the position and distance showed that the signer did not intend to adopt the letters "L. S." as part of his act, but, unless distinguished on that special ground, the decision is contrary to the settled trend of our cases, and cannot be approved. Order opening judgment is reversed, and judgment reinstated.

35 Cyc. 1170 (14); 1171 (23); 1172 (29).

(*ii.*) *Effect of seal.*

ALLER v. ALLER.

40 NEW JERSEY LAW, 446.—1878.

On rule to show cause why a new trial should not be granted on verdict for the plaintiff in Hunterdon County Circuit Court.

The action was brought on the following instrument, viz.:

"One day after date, I promise to pay my daughter, Angeline H. Aller, the sum of three hundred and twelve dollars and sixty-one cents, for value received, with lawful interest from date, without defalcation or discount, as witness my hand and seal this fourth day of September, one thousand eight hundred and seventy-three. $312.61. This note is given in lieu of one-half of the balance due the estate of Mary A. Aller, deceased, for a note given for one thousand dollars to said deceased by me. Peter H. Aller. (L. S.) Witnesses present: John J. Smith, John F. Grandin."

SCUDDER, J. Whether the note for $1000 could have been enforced in equity as evidence of an indebtedness by the husband to the wife during her life, is immaterial, for after her death he was entitled, as husband of his deceased wife, to administer on her estate, and receive any balance due on the note, after deducting legal charges, under the statute of distribution. The daughters could have no legal or equitable claim on this note against their father after their mother's decease. The giving of these two sealed promises in writing to them by their father was therefore a voluntary act on his part. That it was just and meritorious to divide the amount represented by the original note between these only two surviving children of the wife, if it was her separate property, and keep it from going into the general distribution of the husband's estate among his other children, is evident, and such appears to have been his purpose.

The question now is, whether that intention was legally and conclusively manifested, so that it cannot now be resisted.

This depends on the legal construction and effect of the instrument which was given by the father to his daughter.

It has been treated by the counsel of the defendant in his argument, as a promissory note, and the payment was resisted at the trial on the ground that it was a gift. Being a gift *inter vivos,* and without any legal consideration, it was claimed that the action could not be maintained. But the instrument is not a promissory note, having the properties of negotiable paper by the law merchant; nor is it a simple contract, with all the latitude of inquiry into the consideration allowable in such a case; but it is in form and legal construction a deed under seal. It says in the body of the writing, "as witness, my hand and seal," and a seal is added to the name of Peter H. Aller. It is not therefore an open promise for the payment of money, which is said to be the primary requisite of a bill or promissory note, but it is closed or sealed, whereby it loses its character as a commercial instrument and becomes a specialty governed by the rules affecting common law securities. 1 Daniel's Neg. Inst., §§ 1, 31, 34.

It is not at this time necessary to state the distinction between this writing and corporation bonds and other securities which have been held to have the properties of negotiable paper by commercial usage. This is merely an individual promise "to pay my daughter, Angeline H. Aller, the sum of $312.61, for value received," etc. It is not even transferable in form, and there is no intention shown upon its face to make it other than it is clearly expressed to be, a sealed promise to pay money to a certain person or a debt in law under seal. How then will it be affected by the evidence which was offered to show that it was a mere voluntary promise, without legal consideration, or, as it was claimed, a gift unexecuted?

Our statute concerning evidence (Rev., p. 380, § 16), which enacts that in any action upon an instrument in writing, under seal, the defendant in such action may plead and set up as a defense therein fraud in the consideration, is not applicable, for here there is no fraud shown.

But it is said that the act of April 6, 1875 (Rev., p. 387, § 52), opens it to the defense of want of sufficient consideration, as if it were a simple contract, and, that being shown, the contract becomes inoperative.

The statute reads: "That in every action upon a sealed instrument, or where a set-off is founded on a sealed instrument, the seal thereof shall be only presumptive evidence of a sufficient consideration, which may be rebutted, as if such instrument was not sealed," etc.[1]

[1] Held to apply only to executory instruments, Waln v. Waln, 58 N. J. L. 640.

Suppose the presumption that the seal carries with it, that there is a sufficient consideration, is rebutted, and overcome by evidence showing there was no such consideration, the question still remains, whether an instrument under seal, without sufficient consideration, is not a good promise, and enforceable at law. It is manifest that here the parties intended and understood that there should be no consideration. The old man said: "Now here, girls, is a nice present for each of you," and so it was received by them. The mischief which the above quoted law was designed to remedy, was that where the parties intended there should be a consideration, they were prevented by the common law from showing none, if the contract was under seal. But it would be going too far to say that the statute was intended to abrogate all voluntary contracts, and to abolish all distinction between specialties and simple contracts.

It will not do to hold that every conveyance of land, or of chattels, is void by showing that no sufficient consideration passed when creditors are not affected. Nor can it be shown by authority that an executory contract, entered into intentionally and deliberately, and attested in solemn form by a seal, cannot be enforced. Both by the civil and the common law, persons were guarded against haste and imprudence in entering into voluntary agreements. The distinction between *"nudum pactum"* and *"pactum vestitum,"* by the civil law, was in the formality of execution and not in the fact that in one case there was a consideration, and in the other none, though the former term, as adopted in the common law, has the signification of a contract without consideration. The latter was enforced without reference to the consideration, because of the formality of its ratification. 1 Parsons on Cont. (6th ed.) 427.

The opinion of Justice Wilmot in Pillans v. Van Mierop (3 Burr. 1663) is instructive on this point.

The early case of Sharington v. Strotton (Plow. 308) gives the same cause for the adoption of the sealing and delivery of a deed. It says, among other things:

> "Because words are oftentimes spoken by men unadvisedly and without deliberation, the law has provided that a contract by words shall not bind without consideration. And the reason is, because it is by words which pass from men lightly and inconsiderately; but where the agreement is by deed, there is more time for deliberation, etc. So that there is great deliberation used in the making of deeds, for which reason they are received as a *lien* final to the party, and are adjudged to bind the party without examining upon what cause or consideration they were made. And therefore in the case put in 17 Ed. IV., if I by deed promise to give you £20 to make your sale *de novo*, here you shall have an action of debt upon the deed, and the consideration is not examinable, for in the deed there is sufficient consideration, viz., the will of the party that made the deed."

It would seem by this old law, that in case of a deed the saying might be applied, *stat pro ratione voluntas.*

In Smith on Contracts, the learned author, after stating the strictness of the rules of law, that there must be a consideration to support a simple contract to guard persons against the consequences of their own imprudence, says: "The law does not absolutely prohibit them from contracting a gratutious obligation, for they may, if they will, do so by deed."

This subject of the derivation of terms and formalities from the civil law, and of the rule adopted in the common law, is fully described in Fonb. Eq. 335, note *a*. The author concludes by saying: "If, however, an agreement be evidenced, by bond or other instrument, under seal, it would certainly be seriously mischievous to allow its consideration to be disputed, the common law not having pointed out any other means by which an agreement can be more solemnly authenticated. Every deed, therefore, in itself imports a consideration, though it be only the will of the maker, and therefore shall never be said to be *nudum pactum*." See also 1 Chitty on Cont. (11th ed.) 6; Morley v. Boothby, 3 Bing. 107; Rann v. Hughes, 7 T. R. 350, note *a*.

These statements of the law have been thus particularly given in the words of others, because the significance of writings under seal, and their importance in our common law system, seems in danger of being overlooked in some of our later legislation. If a party has fully and absolutely expressed his intention in a writing sealed and delivered, with the most solemn sanction known to our law, what should prevent its execution where there is no fraud or illegality? But because deeds have been used to cover fraud and illegality in the consideration, and just defenses have been often shut out by the conclusive character of the formality of sealing, we have enacted in our State the two recent statutes above quoted. The one allows fraud in the consideration of instruments under seal to be set up as defense, the other takes away the conclusive evidence of a sufficient consideration heretofore accorded to a sealed writing, and makes it only presumptive evidence. This does not reach the case of a voluntary agreement, where there was no consideration, and none intended by the parties. The statute establishes a new rule of evidence, by which the consideration of sealed instruments may be shown, but does not take from them the effect of establishing a contract expressing the intention of the parties, made with the most solemn authentication, which is not shown to be fraudulent or illegal. It could not have been in the mind of the legislature to make it impossible for parties to enter into such promises; and without a clear expression of the legislative will, not only as to the admissibility, but the effect of such evidence, such construction should not be given to this law. Even if it should be held that a consideration is required to uphold a deed, yet it might still be implied where its purpose is not within the mis-

chief which the statute was intended to remedy. It was certainly not the intention of the legislature to abolish all distinction between simple contracts and specialties, for in the last clause of the section they say that all instruments executed with a scroll, or other device by way of scroll, shall be deemed sealed instruments. It is evident that they were to be continued with their former legal effect, except so far as they might be controlled by evidence affecting their intended consideration.

If the statute be anything more than a change of the rules of evidence which existed at the time of the contract was made, and in effect makes a valuable consideration necessary, where such requisite to its validity did not exist at that time, then the law would be void in this case, because it would impair the obligation of a prior contract. This cannot be done. Cooley on Const. Lim. 288, and notes.

The rule for a new trial should be discharged.[1]

W. P. 217 (25–26).

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[1] *The New York Statute:*—"At common law the seal to a written instrument was conclusive evidence of a sufficient consideration, and its conclusive character could not be changed by parol testimony. This rule of the common law, however, was modified by the statute (2 R. S. 406, sec. 77) which is now embraced in our Code of Civil Procedure, section 840, which provides that 'a seal upon an executory instrument, hereafter executed, is only presumptive evidence of a sufficient consideration, which may be rebutted, as if the instrument was not sealed.' Neither a receipt nor a release is a contract or an executory instrument. They are merely declarations or admissions in writing, and consequently it was held that the modification of the statute with reference to seals upon executory instruments does not extend to releases, which, when under seal, continue to be conclusive evidence of a sufficient consideration. (Gray v. Barton, 55 N. Y. 68–71; Ryan v. Ward, 48 N. Y. 204–208.)"—Stiebel v. Grosberg, 202 N. Y. 266. In Talbert v. Storum, 21 N. Y. Supp. 719, the court held that the absolute assignment, under seal, of an insurance policy, was an executed agreement and not an executory agreement, within the meaning of sec. 840 of the Code of Civil Procedure. The seal was therefore held to be conclusive evidence of consideration. A seal will not support a gratuitous *promise*, but merely raises a rebuttable presumption of consideration.—Anthony v. Harrison, 14 Hun, 198 (affirmed, 74 N. Y. 613).

Views of the relation of seal and consideration at common law:—1. "We are not aware of any rule of law, by which a consideration is inferred from the fact of the execution of a sealed instrument. No consideration is necessary, in order to give validity to a deed. It derives its efficacy from the solemnity of its execution—the acts of sealing and delivery, not upon the idea, that the seal imports a consideration, but because it is his solemn *act* and *deed*, and it is therefore obligatory. No consideration being necessary to give validity to a deed, it follows, that the law does not, from the fact of execution, make any inference one way or the other in reference to a consideration. A misapprehension of this subject may have arisen from the fact that, in deeds of conveyance, operating under the statute of uses, either a valuable or a good consideration is necessary, in order to raise the use. But the general rule is, a deed is valid without a consideration. A voluntary bond for money, executed to a stranger, and professing, on its face, to be without consideration,

BENDER *v.* BEEN.

78 IOWA, 283.—1889.

Action upon a promissory note. A demurrer to defendant's answer was overruled, and plaintiff refusing to further plead, and standing on his demurrer, judgment was rendered for defendant. Plaintiff appeals.

BECK, J. I. The promissory note in suit was jointly executed by defendant and four others. It called for two hundred and twenty dollars, and, after certain payments were deducted, it is claimed in the petition that one hundred and fifty dollars remained due thereon, for which judgment is asked. The defndant alleged in his answer that a prior indorsee of the note, while holding it, did execute a writing, discharging defendant from all liability thereon, which is in the following words:

"MT. AYR, IOWA, 5—3, 1887.

"Received of Chas. A. Been forty dollars, and same credited on note dated March 2, 1882, given for two hundred and twenty dollars, and signed by Calvin Stiles, Wm. A. Been, J. S. Been, C. A. Been and Wm. White, given to G. Bender. The consideration of payment of above forty dollars is that Chas. A. Been is to be released entirely from the above-named note. This is done by consent of G. Bender.

"(Signed) DAY DUNNING, *Cashier.*"

It is further alleged in the answer that the note came into the possession of plaintiff long after maturity, who had full knowledge of the release pleaded. A demurrer to the answer was overruled, and from that decision plaintiff appeals.

II. It is a familiar rule of the law that a payment of a part of a promissory note, or of a debt existing in any different form, in discharge of the whole, will not bar recovery of the balance unpaid.

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and for mere friendship, is binding."—Walker v. Walker, 13 Ire. Law (N. C.), 335.

2. "A seal imports a consideration and creates a legal obligation. Candor & Henderson's Appeal, 27 Pa. 120. In an action upon a bond or note under seal want of consideration is no defense: Sherk v. Endress, 3 W. & S. 255; Yard v. Patton, 13 Pa. 278; Anderson v. Best, 176 Pa. 498."—Cosgrove v. Cummings, 195 Pa. St. 497. "The bond is under seal and imports a consideration and it is not necessary to state the consideration that induced its execution. The defendant cannot be heard to say that it is without consideration. Chitty on Pleadings, vol. I, p. 366; Chitty on Contracts, p. 4."—Barrett v. Carden, 65 Vt. 431.

3. "The sealing of an instrument is a legal implication of a consideration; it dispenses with the proof on the part of the plaintiff. The onus of showing that it was without consideration is cast on the defendant. If he is able to make it appear, the defense is just as available to him against a single bill or bond, as it is against a note of hand or other parol contract."—Maltock v. Gibson, 8 Rich. Law (S. C.), 437.

The rule is based upon the principle that there is no consideration for the promise of discharge; the sum paid being in fact due from the payer on the debt, he renders no consideration to the payee for his promise to release the balance of the debt. This doctrine has been recognized in more than one decision of this court. Myers v. Byington, 34 Iowa, 205; Works v. Hershey, 35 Iowa, 340; Rea v. Owens, 37 Iowa, 262; Bryan v. Brazil, 52 Iowa, 350; Early v. Burt, 68 Iowa, 716. Under this rule the discharge pleaded by defendant is without consideration, and is therefore void.

III. But counsel for defendant make an ingenious argument to show that the rule of the common law applicable to sealed instruments, under which they import a consideration in this State, since the abolition of private seals, is transferred to all writings which, like sealed instruments under the common law, import consideration. Without at all approving the position advocated by counsel, but regarding it as more than doubtful, it may be assumed for the purpose of showing that it cannot be applied to the case before us. It is not and cannot be claimed that a sealed instrument imports a valid consideration when it shows, by its own conditions and recitations, that it is in fact not founded upon a consideration. In other words, the presumption of consideration arising from a seal will not overcome the express language and conditions of a sealed instrument, showing that it is without consideration. We think that this proposition need only to be stated to gain assent. It does not demand in its support the citation of authorities. Attention to the release pleaded by defendant, and quoted above, discloses the fact that it shows, by positive and direct recitations, that a payment of a part of the debt was the alleged consideration of the instrument for the release of the balance of the debt. The instrument, therefore, relied upon to show the release establishes the fact that it is entirely without consideration, and cannot therefore be enforced.

It is our opinion that the District Court erred in overruling plaintiff's demurrer to defendant's answer. Its judgment is therefore reversed.

(*iii.*) *Delivery.*

GORHAM'S ADM'R *v.* MEACHAM'S ADM'R.

63 VERMONT, 231.—1891.

Bill in chancery for foreclosure of a mortgage. Heard at the September term, 1890, upon pleadings and an agreed statement of facts. Taft, Chancellor, dismissed the bill, *pro forma.*

TYLER, J. The following facts are reported: Rollin S. Meacham in his lifetime was administrator with the will annexed of the estate of

Angeline W. Gorham, and became largely indebted to the estate for moneys that had come into his hands as such administrator. For the purpose of securing the estate for this indebtedness, on March 1, 1889, he made and executed a promissory note for $1550, payable to himself as administrator, on demand, and in like manner a mortgage of his home place, conditioned for the payment of the note. He never settled the estate nor rendered any account to the Probate Court. He converted the assets into money and appropriated it to his own use in his private business. At the time the note and mortgage were executed, and at his decease, he was indebted to the estate to the amount of $7000, and was insolvent. His debts, besides what he owed the estate, amounted to about $9000, and his assets to about $4000. The note and mortgage were retained by him and were found after his decease in his safe among other papers that belonged to the estate, and among certain deeds and mortgages of his own. He died November 17, 1889. His wife was the daughter of the testatrix, and is the only person interested in her estate. After Meacham's decease, the defendant, as his administrator, handed the note and mortgage to Burditt, after the latter's appointment as administrator upon the estate of Mrs. Gorham, and Burditt caused the mortgage to be recorded in the town clerk's office. The question is as to its validity.

1. The mortgage must be held invalid for want of contracting parties. A contract necessarily implies a concurrence of intention in two parties, one of whom promises something to the other, who on his part accepts such promise. One person cannot by his promise confer a right against himself until the person to whom the promise is made has accepted the same. Until the concurrence of the two minds there is no contract; there is merely an offer which the promisor may at any time retract. Chitty on Cont. 9, quoting Pothier on Obligations. It is essential to the validity of a deed that there be proper parties, a person able to contract and a person able to be contracted with. 3 Wash. Real Prop. 217.

To uphold this mortgage we must say that there may be two distinct persons in one, for in law this mortgagor and mortgagee are identical. The addition of the words, "executor of A. W. Gorham's estate," does not change the legal effect of the grant, which is to Meacham in his individual capacity. In 3 Wash. 279, it is said that a grant to A, B, and C, trustees of a society named, their heirs, etc., is a grant to them individually, and Austin v. Shaw, 10 Allen, 552, Towar v. Hale, 46 Barb. 361, and Brown v. Combs, 29 N. J. L. 36, are cited. In this case the grant and the habendum are not to the estate and its legal representatives, but to Meacham, executor, his heirs and assigns. Meacham had misappropriated the funds of the estate, and

no one but himself assented to his giving a note and mortgage for the purpose of partially covering his default.

2. The mortgage was not delivered. An actual manual delivery of a deed or mortgage is not necessary. If it has been so disposed of as to evince clearly the intention of the parties that it should take effect as a conveyance, it is a sufficient delivery. Orr v. Clark, 62 Vt. 136. Whether it has been so disposed of or not depends upon the facts of a given case. In Elmore v. Marks (39 Vt. 538) the orator was indebted to Marks, and for the purpose of security made and executed to him a deed of certain land and carried it to the town clerk's office to be filed but not recorded, and to be returned to him when his indebtedness to Marks should be paid. Through inadvertence the deed was recorded and the orator took it into his possession. It was never delivered to Marks and he had no knowledge of it until several months after it was recorded, when the orator told him that it had been recorded by mistake. It was held that there was no delivery. Pierpoint, C. J., said: "All authorities seem to agree that to constitute a delivery the grantor must part with the custody and control of the instrument, permanently, with the intention of having it take effect as a transfer of the title, and must part with his right to the instrument as well as with the possession. So long as he retains the control of the deed he retains the title."

Anything which clearly manifests the intention of the grantor and the person to whom it is delivered that the deed should presently become operative and effectual, that the grantor loses all control over it, and that by it the grantee is to become possessed of the estate, constitutes a delivery. Byars v. Spencer, 101 Ill. 429.

In Stone v. French (1 Am. St. Rep. 237) it appeared that Francis B. French formed an intention of giving a certain piece of land to his brother unless he should dispose of it during his lifetime; accordingly he wrote a letter to his brother in which he stated that in case of his decease his brother should have the land and do with it as he pleased; that he, the grantor, would make a deed of it, inclose it in an envelope and direct it to his brother, to be mailed in event of the grantor's death. The grantor afterwards made a deed which contained the usual words, "signed, sealed, and delivered in the presence of," etc. It was in all respects properly executed and was placed in an envelope in the grantor's table drawer with directions indorsed upon the envelope to have the deed recorded, but it was in fact never delivered. It was held that there was no delivery of the deed and that the title to the land did not pass to the grantee; that the deed being void, the recording of it after the grantor's death gave it no validity.

A mere intention to convey a title is not sufficient. The intention and the act of delivery of the deed are both essential. To constitute

a complete delivery of a deed the grantor must do some act putting it beyond his power to revoke. 2 Cowen & Hill's Notes to Phillips' Ev. (5th ed.) 660, and authorities collated. In Younge v. Guilbeau (3 Wall. 636) it is said that "the delivery of a deed is essential to the transfer of a title. It is the final act without which all other formalities are ineffectual. To constitute such delivery the grantor must part with the possession of the deed or the right to retain it." In Fisher v. Hall (41 N. Y. 416) the Court of Appeals said: "A rule of law, by which a voluntary deed executed by the grantor, afterward retained by him during his life in his own exclusive possession and control, never during that time made known to the grantee, and never delivered to any one for him, or declared by the grantor to be intended as a present operative conveyance, could be permitted to take effect as a transmission of the title, is so inconsistent with every substantial right of property as to deserve no toleration whatever from any intelligent court, either of law or equity."

Without a delivery and acceptance there is no mortgage, but only an attempt at one, or a proposition to make one. 1 Jones on Morts. sec. 104; Jewett v. Preston, 27 Me. 400; Foster v. Perkins, 42 Me. 168; 3 Wash. Real Prop. 299.

The fact that the note and mortgage, duly executed by Meacham, were found after his decease among his papers and papers of the estate, shows no delivery of them in any legal sense; on the contrary, the facts that he omitted to have the mortgage recorded, that he retained it in his possession and under his control so long a time, and that it ran to him and his heirs and assigns, indicate that he never decided to give it legal effect. He did not make it operative in his lifetime, or direct that it should take effect at his death, which was necessary to give it a testamentary character. The act of recording it after that event could not give it validity.

Decree affirmed, and cause remanded.

9 Cyc. 371–372 (76–78); 27 Cyc. 1113 (8–9).

Simple contracts required to be in writing: Statute of Frauds.

STATUTE OF FRAUDS.

29 CAR. II. c. 3. s. 4.

§ 4. No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; or to charge any person upon any agreement made in consideration of marriage; or upon any contract or sale of lands, tenements

or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.

§ 17. No contract for the sale of any goods, wares or merchandise for the price of ten pounds sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.

(*i.*) *Requirements of form.*

BIRD *v.* MUNROE.

66 MAINE, 337.—1877.

Assumpsit. Defense, the statute of frauds. After hearing the evidence, which sufficiently appears in the opinion, the court directed that the action be made law on report to stand for trial if maintainable upon evidence legally admissible, otherwise the plaintiffs to be nonsuit.

PETERS, J. On March 2, 1874, at Rockland, in this State, the defendant contracted verbally with the plaintiffs for the purchase of a quantity of ice, to be delivered (by immediate shipments) to the defendant in New York. On March 10, 1874, or thereabouts, the defendant, by his want of readiness to receive a portion of the ice as he had agreed to, temporarily prevented the plaintiffs from performing the contract on their part according to the preparations made by them for the purpose. On March 24, 1874, the parties, then in New York, put their previous verbal contract into writing, antedating it as an original contract made at Rockland on March 2, 1874. On the same day (March 24), by consent of the defendant, the plaintiffs sold the same ice to another party, reserving their claim against the defendant for the damages sustained by them by the breach of the contract by the defendant on March 10th or about that time. This action was commenced on April 11, 1874, counting on the contract as made on March 2, and declaring for damages sustained by the breach of contract on March 10, or thereabouts, and prior to March 24, 1874. Several objections are set up against the plaintiffs' right to recover.

The first objection is, that in some respects the allegations in the writ and the written proof do not concur. But we pass this point,

as any imperfection in the writ may, either with or without terms, be corrected by amendment hereafter.

Then it is claimed for the defendant that, as matter of fact, the parties intended to make a new and original contract as of March 24, by their writing made on that day and antedated March 2, and that it was not their purpose thereby to give expression and efficacy to any unwritten contract made by them before that time. But we think a jury would be well warranted in coming to a different conclusion. Undoubtedly there are circumstances tending to throw some doubt upon the idea that both parties understood that a contract was fully entered into on March 2, 1874, but that doubt is much more than overcome when all the written and oral evidence is considered together. We think the writing made on the 24th March, with the explanations as to its origin, is to be considered precisely as if the parties on that day had signed a paper dated of that date, certifying and admitting that they had on the 2d day of March made a verbal contract, and stating in exact written terms just what such verbal contract was. Parol evidence is proper to show the situation of the parties and the circumstances under which the contract was made. It explains but does not alter the terms of the contract. The defendant himself invokes it to show that, according to his view, the paper bears an erroneous date. Such evidence merely discloses in this case such facts as are part of the *res gestæ*. Benjamin on Sales, § 213; Stoops v. Smith, 100 Mass. 63, 66, and cases there cited.

Then the defendant next contends that, even if the writing signed by the parties was intended by them to operate retroactively as of the first-named date, as a matter of law, it cannot be permitted to have that effect and meet the requirements of the statute of frauds. The position of the defendant is, that all which took place between the parties before the 24th of March was of the nature of negotiation and proposition only; and that there was no valid contract, such as is called for by the statute of frauds, before that day; and that the action is not maintainable, because the breach of contract is alleged to have occurred before that time. The plaintiffs, on the other hand, contend that the real contract was made verbally on the 2d of March, and that the written instrument is sufficient proof to make the verbal contract a valid one as of that date (March 2), although the written proof was not made out until twenty-two days after that time. Was the valid contract, therefore, made on March 2d or March the 24th? The point raised is, whether, in view of the statute of frauds, the writing in this case shall be considered as constituting the contract itself, or at any rate any substantial portion of it, or whether it may be regarded as merely the necessary legal evidence by means of which the prior unwritten contract may be proved.

In other words, is the writing the contract, or only evidence of it? We incline to the latter view.

The peculiar wording of the statute presents a strong argument for such a determination. The section reads: "No contract for the sale of any goods, wares, or merchandise, for thirty dollars or more, shall be valid, unless the purchaser accepts and receives part of the goods, or gives something in earnest to bind the bargain, or in part payment thereof, or some note or memorandum thereof is made and signed by the party to be charged thereby, or his agent." In the first place, the statute does not go to all contracts of sale, but only to those where the price is over a certain sum. Then the requirement of the statute is in the alternative. The contract need not be evidenced by writing at all, provided "the purchaser accepts and receives a part of the goods, or gives something in earnest to bind the bargain or in part payment thereof." If any one of these circumstances will as effectually perfect the sale as a writing would, it is not easily seen how the writing can actually constitute the contract, merely because a writing happens to exist. It could not with any correctness be said, that anything given in earnest to bind a bargain was a substantial part of the bargain itself, or anything more than a particular mode of proof. Then it is not the contract that is required to be in writing, but only "some note or memorandum thereof." This language supposes that the verbal bargain may be first made, and a memorandum of it given afterwards. It also implies that no set and formal agreement is called for. Chancellor Kent says "the instrument is liberally construed without regard to forms." The briefest possible forms of a bargain have been deemed sufficient in many cases. Certain important elements of a completed contract may be omitted altogether. For instance, in this State, the consideration for the promise is not required to be expressed in writing. Gillighan v. Boardman, 29 Me. 79. Again, it is provided that the note or memorandum is sufficient, if signed only by the person sought to be charged. One party may be held thereby and the other not be. There may be a mutuality of contract but not of evidence or of remedy. Still, if the writing is to be regarded in all cases as constituting the contract, in many cases there would be but one contracting party.

Another idea gives weight to the argument for the position advocated by the plaintiffs; and that is, that such a construction of the statute upholds contracts according to the intention of parties thereto, while it, at the same time, fully subserves all the purposes for which the statute was created. It must be borne in mind that verbal bargains for the sale of personal property are good at common law. Nor are they made illegal by the statute. Parties can execute them if they mutually please to do so. The object of the statute is to prevent

perjury and fraud. Of course, perjury and fraud cannot be wholly prevented; but, as said by Bigelow, J. (Marsh v. Hyde, 3 Gray, 331), "a memorandum in writing will be as effectual against perjury, although signed subsequently to the making of a verbal contract, as if it had been executed at the moment when the parties consummated their agreement by word of mouth." We think it would be more so. A person would be likely to commit himself in writing with more care and caution after time to take a second thought. The *locus penitentiæ* remains to him.

By no means are we to be understood as saying that all written instruments will satisfy the statute, by having the effect to make the contracts described in them valid from their first verbal inception. That must depend upon circumstances. In many, and perhaps most, instances such a version of the transaction would not agree with the actual understanding of the parties. In many cases, undoubtedly, the written instrument is *per se* the contract of the parties. In many cases, as, for instance, like the antedating of the deed in Egery v. Woodard (56 Maine, 45), cited by the defendant, the contract (by deed) could not take effect before delivery; the law forbids it. So a will made by parol is absolutely void. But all these classes of cases differ from the case before us.

A distinction is attempted to be set up between the meaning to be given to R. S. c. 111, § 4, where it is provided that no unwritten contract for the sale of goods "shall be valid," and that to be given to the several preceding sections where it provided that upon certain other kinds of unwritten contracts "no action shall be maintained"; the position taken being that in the former case the contract is void, and in the other cases only voidable perhaps, or not enforceable by suit at law. But the distinction is without any essential difference, and is now so regarded by authors generally and in most of the decided cases. All the sections referred to rest upon precisely the same policy. Exactly the same object is aimed at in all. The difference of phraseology in the different sections of the original English statute, of which ours is a substantial copy, may perhaps be accounted for by the fact, as is generally conceded, that the authorship of the statute was the work of different hands. Although our statute (R. S. 1871, § 4) uses the words "no contracts shall be valid," our previous statutes used the phrase "shall be allowed to be good"; and the change was made when the statutes were revised in 1857, without any legislative intent to make any alteration in the sense of the section. R. S. 1841, c. 136, § 4. The two sets of phrases were undoubtedly deemed to be equivalent expressions. The words of the original English section are, "shall not be allowed to be good," meaning, it is said, not good for the purpose of sustaining an action thereon without written proof. Browne, St. Frauds §§ 115, 136, and notes to the sections;

Benjamin's Sales, § 114; Townsend v. Hargraves, 118 Mass. 325, and cases there cited.

There are few decisions that bear directly upon the precise point which this case presents to us. From the nature of things, a state of facts involving the question would seldom exist. But we regard the case of Townsend v. Hargraves, above cited, as representing the principle very pointedly. It was there held that the statute of frauds affects the remedy only and not the validity of the contract; and that where there has been a completed oral contract of sale of goods, the acceptance and receipt of part of the goods by the purchaser takes the case out of the statute, although such acceptance and receipt are after the rest of the goods are destroyed by fire while in the hands of the seller or his agent. The date of the agreement rather than the date of the part acceptance was treated as the time when the contract was made; and the risk of the loss of the goods was cast upon the buyer. Vincent v. Germond (11 Johns. 283) is to the same effect. We are not aware of any case where the question has been directly adjudicated adversely to these cases. Webster v. Zielly (52 Barb. [N. Y.] 482), in the argument of the court, directly admits the same principle. The case of Leather Cloth Co. v. Hieronimus (L. R. 10 Q. B. 140) seems also to be an authority directly in point. Thompson v. Alger (12 Met. 428, 435) and Marsh v. Hyde (3 Gray, 331), relied on by defendant, do not, in their results, oppose the idea of the above cases, although there may be some expressions in them inconsistent therewith. Altogether another question was before the court in the latter cases.

But there are a great many cases where, in construing the statute of frauds, the force and effect of the decisions go to sustain the view we take of this question, by the very strongest implication; such as, that the statute does not apply where the contract has been executed on both sides, Bucknam v. Nash, 12 Maine, 474; that no person can take advantage of the statute but the parties to the contract, and their privies, Cowan v. Adams, 10 Maine, 374; that the memorandum may be made by a broker, Hinckley v. Arey, 27 Maine, 362; or by an auctioneer, Cleaves v. Foss, 4 Maine, 1; that a sale of personal property is valid when there has been a delivery and acceptance of part, although the part be accepted several hours after the sale, Davis v. Moore, 13 Maine, 424; or several days after, Bush v. Holmes, 53 Maine, 417; or ever so long after, Browne, St. Frauds, § 337, and cases there noted; that a creditor, receiving payments from his debtor without any direction as to their application, may apply them to a debt on which the statute of frauds does not allow an action to be maintained, Haynes v. Nice, 100 Mass. 327; that a contract made in France, and valid there without a writing, could not be enforced in England without one, upon the ground that the statute related to

the mode of procedure and not to the validity of the contract, Leroux v. Brown, 12 C. B. 801; but this case has been questioned somewhat; that a witness may be guilty of perjury who falsely swears to a fact which may not be competent evidence by the statute of frauds, but which becomes material because not objected to by the party against whom it was offered and received, Howard v. Sexton, 4 Comstock, 157; that an agent who signs a memorandum need not have his authority at the time the contract is entered into, if his act is orally ratified afterwards, Maclean v. Dunn, 4 Bing. 722; that the identical agreement need not be signed, and that it is sufficient if it is acknowledged by any other instrument duly signed, Gale v. Nixon, 6 Cow. 445; that the recognition of the contract may be contained in a letter, or in several letters, if so connected by "written links" as to form sufficient evidence of the contract; that the letters may be addressed to a third person, Browne, St. Frauds, § 346; Fyson v. Kitton, 30 E. L. & Eq. 374; Gibson v. Holland, L. R. 1 C. P. 1; that an agent may write his own name instead of that of his principal if intending to bind his principal by it, Williams v. Bacon, 2 Gray, 387, 393, and citations there; that a proposal in writing, if accepted by the other party by parol, is a sufficient memorandum, Reuss v. Picksley, L. R. 1 Exc. 342; that where one party is bound by a note or memorandum the other party may be bound if he admits the writing by another writing by him subsequently signed, Dobell v. Hutchinson, 3 A. & E. 355; that the written contract may be rescinded by parol, although many decisions are opposed to this proposition, Richardson v. Cooper, 25 Maine, 450; that equity will interfere to prevent a party making the statute an instrument of fraud, Ryan v. Dox, 34 N. Y. 307; Hassam v. Barrett, 115 Mass. 256, 258; that a contract verbally made may be maintained for certain purposes, notwithstanding the statute; that a person who pays his money under it cannot recover it back if the other side is willing to perform; and he can recover if performance is refused, Chapman v. Rich, 63 Maine, 588, and cases cited; that a respondent in equity waives the statute as a defense unless set up in plea or answer, Adams v. Patrick, 30 Vt. 516; that it must be specially pleaded in an action at law, Middlesex Co. v. Osgood, 4 Gray, 447; Lawrence v. Chase, 54 Maine, 196; that the defendant may waive the protection of the statute and admit verbal evidence and become bound by it, Browne, St. Frauds, § 135.

It may be remarked, however, that in most courts a defendant may avail himself of a defense of the statute under the general issue. The different rule in Massachusetts and Maine grew out of the practice act in the one State and in the statute requiring the filing of specifications in the other.

It is clear from the foregoing cases, as well as from many more that might be cited, that the statute does not forbid parol con-

tracts, but only precludes the bringing of actions to enforce them. As said in Thornton v. Kempster (5 Taunt. 786, 788), "the statute of frauds throws a difficulty in the way of the evidence." In a case already cited, Jervis, C. J., said: "The effect of the section is not to avoid the contract, but to bar the remedy upon it, unless there be writing." See analogous case of McClellan v. McClellan, 65 Maine, 500.

But the defendant contends that this course of reasoning would make a memorandum sufficient if made after action brought, and that the authorities do not agree to that proposition. There has been some judicial inclination to favor the doctrine to that extent even, and there may be some logic in it. Still the current of decision requires that the writing must exist before action brought. And the reason for the requirement does not militate against the idea that a memorandum is only evidence of the contract. There is no actionable contract before memorandum obtained. The contract cannot be sued until it has been legally verified by writing; until then there is no cause of action, although there is a contract. The writing is a condition precedent to the right to sue. Willes, J., perhaps correctly describes it in Gibson v. Holland, *supra,* when he says, "the memorandum is in some way to stand in the place of a contract." He adds: "The courts have considered the intention of the legislature to be of a mixed character; to prevent persons from having actions brought against them so long as no written evidence was existing when the action was instituted." Browne, St. Frauds, § 338; Benjamin's Sales, § 159; Fricker v. Thomlinson, 1 Man. & Gr. 772; Bradford v. Spyker, 32 Ala. 134; Bill v. Bament, 9 M. & W. 36; Philbrook v. Belknap, 6 Vt. 383. In the last case it is said, "strictly speaking, the statute does not make the contract void, except for the purpose of sustaining an action upon it, to enforce it."

Action to stand for trial.

APPLETON, C. J., WALTON, DANFORTH, VIRGIN, and LIBBEY, JJ., concurred.[1]

20 Cyc. 257 (92); 284 (48); W. P. 782 (18).

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[1] *Is the contract void?*—In Kleeman and Co. v. Collins, 9 Bush (Ky.), 460, an action was brought upon a contract made in Illinois, to be performed in Louisiana, and it was alleged that it was by its terms not to be performed within a year, and the statute of frauds was set up as a defense. The court said: "It is insisted by appellee's counsel that the statute of frauds of this state cannot affect the contract or a recovery upon it, as it was made in Illinois to be performed in Louisiana, and in the latter state no such statute exists. . . . The principle that the legal character and validity of a contract is to be determined by the *lex loci contractus,* or by the laws of the place where it is to be performed, is so well understood as not to require the citation of any authority in support of it, and it is equally as well settled that the mode of proceeding and character of actions to be instituted are governed by the

O'DONNELL *v.* LEEMAN.

43 MAINE, 158.—1857.

MAY, J. The declaration in this case alleges a contract in writing, of a sale from the defendant to the plaintiff, of a dwelling-house at auction, upon certain specified terms and conditions. According to the contract alleged, the price to be paid was twelve hundred dollars; one-third cash down, and the residue in equal payments, in one and two years. The memorandum of sale, as contained in the auctioneer's book, is as follows:

"Oct. 9, 1855. This day sold W. H. Leeman house and land on Bartlett street, in Lewiston; was struck down to Patrick O'Donnell for $1200, one-third cash down.

"HAM BROOKS, *Auctioneer.*"

That the auctioneer in cases of such sales, whether of real or personal estate, is the agent of both parties, and that a memorandum signed by him at the time of the sale, stating the particulars of the contract, and the parties thereto, is a sufficient signing within the statute of frauds, is well settled. Emmerson v. Heelis, 2 Taunt.

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laws of the place where the remedy is sought. Story on Conflict of Laws, sec. 556, p. 935. If therefore the statute of frauds in this state affects the validity of contracts made in parol when not to be performed within a year the defense relied on should be disregarded; and on the other hand, if the statute is to be applied to the remedy only, no recovery can be had upon such a contract. In the case of Leroux v. Brown (reported in 14 English Law and Equity Reports) [12 C. B. 801] the action was instituted in one of the English courts upon a contract made in France. The defence was the fourth section of the statute of frauds, and the plaintiff insisted that as the contract was made in France the English statute had no application to the case. It was adjudged in that case that no action could be maintained upon such a contract (it being in parol, and not to be performed within a year) in England, because the fourth section of the statute related to the mode of procedure, and not to the validity of the contract. This section of the English statute is identical with the statute of this state upon the same subject." See also 19 L. R. A. 119; 64 L. R. A. 792.

That the statute affects only executory contracts, see Finch, J., in Brown v. Farmers' Loan & Trust Co., 117 N. Y. 266, 273 (1889): "It is insisted, however, that the sale cannot stand because the contract was void under the statute of frauds. But that statute affects only executory and not executed contracts (Dodge v. Crandall, 30 N. Y. 304). It is the rule of evidence where the one party or the other is seeking performance or damages for non-performance. It has no office to perform when the contract has been executed on both sides, has been fully carried out by the parties, and requires no aid from the law."

In some states the contract is not merely unenforceable, but is void. Nelson v. Shelby Co., 96 Ala. 515; Scott v. Bush, 26 Mich. 418, 29 Mich. 523; Koch v. Williams, 82 Wis. 186.

46; McComb v. Wright, 4 John. Ch. R. 666; Chitty on Contracts, 305; Cleaves v. Foss, 4 Maine, R. 1; Alna v. Plummer, 4 Id. 258.

It is equally well settled that unless there be a memorandum showing, within itself, or by reference to some other paper, all the material conditions of the contract, no action can be maintained upon such contract, either at law or in equity. Sales at auction are now held to fall within the statute; as much so as other sales. Pike v. Balch *et al.*, 38 Maine R. 302; Merritt v. Clason, 12 Johns. R. 102; Bailey *et al. v.* Ogden, 3 Johns. R. 399; Morton v. Dean, 13 Met. R. 385. And it cannot well be doubted that evasions of this statute, made as it was for the suppression of perjury, ought not to be encouraged.

The memorandum in this case contains no reference to the condition of the payment, except in the words, "one-third cash down." It does not appear from it when the residue was intended to be paid. It was attempted at the trial to show the terms of the payment to be as alleged in the writ, by the introduction of certain handbills and newspaper notices, signed by the defendant, and published by him just before the sale, and which, it is said in argument, were exhibited at the time of the sale, and in which the terms of the sale, it is said, were fully stated. The evidence offered by the plaintiff to connect the handbills and notices with the memorandum, and to explain it, was excluded by the presiding judge.

That such extrinsic evidence was inadmissible the following authorities clearly show: 2 Parson on Contracts, p. 298; Hinde v. Whitehouse, 7 East, 558; The First Baptist Church in Ithaca v. Bigelow, 16 Wend. 28; The Inhab. of the First Parish in Freeport v. Bartol, 3 Maine R. 340.

It is said, however, that if such evidence is not admissible, then the contract, upon its face, as stated in the memorandum, stipulates for the payment of one-third cash down, and the residue in a reasonable time; and that, if so, the notes tendered in this case, having been made payable in one and two years, should be deemed a compliance with the terms of the contract in this respect. Considering the nature and value of the estate to be conveyed, and that long credit is often if not usually given in such sales, perhaps a somewhat extended time of payment might be regarded as reasonable; but we know of no rule by which money that is made payble *in a reasonable time,* can, at the election of the party paying, be divided so as to make it payable at different times, and in different years. A reasonable time is indivisible; and the party to whom the money is payable, under such a contract, cannot be required to take it in separate payments, and at separate times.

The auctioneer's memorandum in this case failing to show any such contract as is alleged, so far as relates to the terms of pay-

ment, it becomes unnecessary to decide upon its sufficiency in other respects, or upon the admissibility of the other evidence offered. According to the agreement of the parties, the nonsuit must stand.

29 Cyc. 278 (8-9); 12 C. L. R. 566.

FIELD *v.* KIESER.

77 N. Y. MISCELLANEOUS REPORTS, 105.—1912.

(*Supreme Court, Appellate Term.*)

LEHMAN, J. Plaintiff sues upon a contract made on or about the 7th day of May, 1907. On that day the plaintiff wrote and mailed to the defendants the following letter:

"May 7, 1909.

"F. Kieser & Son—Dear Sirs: I beg to confirm my sale to you to-day: 10 m. Bus. Standard wht. oats, at 58½ cents per bushel. C. I. F. Haverstraw, Erie. Shipment, July. To be billed. Western official certificates of weight and grade final. Draft payable at sight with proper documents attached. Excluding date of sale, time of shipment dates from receipt of full shipping instructions and excludes Sundays and legal holidays. Terms in this contract final. If not correct, advise me at once. In writing or wiring, please refer to ALBERT C. FIELD, Inc.,

"By A. C. Field, Pres."

It was shown at the trial that it is the usage in the grain trade to send a letter of similar form—

"on the evening of the day when you had a transaction about the grain to the person you had a contract with. It is also the custom and usage of the trade that, if no advice is received from the party you have sent it to, the contract mailed is adopted as the written contract between the parties."

No answer was received to this letter, and the plaintiff shipped the grain at the end of July. On August 2d the defendants telegraphed to plaintiff:

"No delivery made on July oats contract ten thousand bushels considered same canceled."

The plaintiff claims that this telegram incorporates the terms of the letter written by them, and is a sufficient memorandum to take the case out of the statute of frauds. The telegram, while stating that defendants considered the contract on July oats canceled by failure to deliver, admits, by fair construction, that a contract for 10,000 bushels of July oats was made. The letter of May 7, 1909, written by the plaintiff, concededly contains all the terms of a complete contract, and would be sufficient to take the case out of the statute of frauds as against the plaintiff. If, therefore, the letter can be incorporated in and read with the telegram, the defendants have

signed a memorandum setting forth the complete terms of the agreement, even though, at the same time, they state that they regarded it as canceled. In the case of Brauer v. Oceanic Steam Nav. Co., 178 N. Y. 339, 344, 70 N. E. 863, 865, it was said:

"A note or memorandum sufficient to take a contract out of the operation of the statute of frauds must state the whole contract with reasonable certainty, so that the substance thereof may be made to appear from the record itself without regard to parol evidence."

This rule, however, does not mean that extrinsic evidence may not be given for the purpose of identifying an object named in the memorandum (Waring v. Ayres, 40 N. Y. 357), and it is well established that, where one memorandum is imputed by reference or annexation into another one, evidence of the identity of the memorandum referred to may be supplied by parol (Abbott's Trial Evidence [2d Ed.] pp. 358, 359). This parol evidence must, of course, be sufficient to identify this memorandum clearly, leaving no room for a fair dispute as to the contract referred to. In this case I think the evidence is amply sufficient for the purpose. The uncontradicted proof shows that on August 2d the plaintiff had no other transaction with the defendants than the sale of 10,000 bushels of July oats, as set forth in the complaint; that a letter setting forth the terms of the sale in writing was mailed to the defendants, and presumably received by them; that this letter was never answered; that it was denominated a "contract"; and that, by custom and usage of trade, if unanswered, such a letter is adopted as the contract of the parties. It seems to me that, so long as this evidence is uncontradicted, it established that the "contract" referred to was the letter of May 7th, and incorporated that letter by reference into the telegram. See Beckwith v. Talbot, 95 U. S. 289, 24 L. Ed. 496; Cave v. Hastings, 7 Q. B. D. 125.

Judgment should be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.[1]

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[1] In Doherty v. Hill, 144 Mass. 165, the court said: "The memorandum would have satisfied the Statute of Frauds, if the evidence had shown that there was only one 'estate on Congress Street owned by Sarah A. Hill,' in Stoneham, where the memorandum is dated. Hurley v. Brown, 98 Mass. 545; Scanlan v. Geddes, 112 Mass. 15; Mead v. Parker, 115 Mass. 413. But the evidence shows that there was more than one. . . . If, on the existing facts, they apply only to one, then the document identifies the land; if not, it fails to do so. In every case, the words used must be translated into things and facts by parol evidence. But if, when so translated, they do not 'identify the estate intended, as the only one which would satisfy the description,' they do not satisfy the statute. See Slater v. Smith, 117 Mass. 96, 98; Potter v. Duffield, L. R. 18 Eq. 4, 7." In Holmes v. Evans, 48 Miss. 247, the clause was, "a piece of property on the corner of Main and Pearl Streets, city of Natchez, county of Adams, State of Mississippi." The clause was held insufficient be-

CLASON *v.* BAILEY.

14 JOHNSON (N. Y.), 484.—1817.

These causes came before this court on writs of error to the Supreme Court. The facts in all were, substantially, the same. See Merritt & Merritt v. Clason, 12 Johns. Rep. 102.

THE CHANCELLOR. The case struck me upon the argument as being very plain. But as it may have appeared to other members of the court in a different, or, at least, in a more serious light, I will very briefly state the reasons why I am of opinion that the judgment of the Supreme Court ought to be affirmed.

The contract on which the controversy arises was made in the following manner:

Isaac Clason employed John Townsend to purchase a quantity of rye for him. He, in pursuance of this authority, purchased of Bailey & Voorhees 3000 bushels, at one dollar per bushel, and at the time of closing the bargain, he wrote a memorandum in his memorandum book in the presence of Bailey & Voorhees, in these words: "February 29th, bought for Isaac Clason, of Bailey & Voorhees, 3000 bushels of good merchantable rye, deliverable from the 5th to the 15th of April next, at one dollar per bushel, and payable on delivery."

The terms of the sale and purchase had been previously communicated to Clason, and approved of by him, and yet at the time of delivery he refused to accept and pay for the rye.

The objection to the contract, on the part of Clason, is that it was not a valid contract within the statute of frauds.

1. Because the contract was not signed by Bailey & Voorhees.

2. Because it was written with a lead pencil, instead of pen and ink.

I will examine each of these objections.

1. It is admitted that Clason signed this contract, by the insertion of his name by his authorized agent, in the body of the memorandum. The counsel for the plaintiff in error do not contend against the position that this was a sufficient subscription on *his* part. It is a

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cause there was no reference in the memorandum itself to anything extrinsic that would define which corner was intended. In Mellon v. Davidson, 123 Pa. 298, the clause was, "a lot of ground fronting about 190 feet on the P. R. R. in the 21st ward Pittsburgh, Pa." This clause was held insufficient, though the seller owned but one piece of land in the ward named. But in Pelletreau v. Brennan and May, 113 N. Y. Appellate Div. 806, where the clause was: "May agree to sell and Pelletreau agree to buy Clinton and Joralemon Street." The court held: "The description, 'Clinton and Joralemon Street,' suffices, for it enables the land to be identified and fully described by evidence *dehors* (Waring v. Ayres, 40 N. Y. 357; Miller v. Tuck, 95 App. Div. 134; Levin v. Dietz, 106 id. 208); and such evidence was given. As the parties were dealing in the city of New York, the legal inference is that the contract refers to land there."

point settled, that if the name of a party appears in the memorandum, and is applicable to the whole substance of the writing, and is put there by him or by his authority, it is immaterial in what part of the instrument the name appears, whether at the top, in the middle, or at the bottom. Saunderson v. Jackson, 2 B. & Puller, 238; Welford v. Beazely, 3 Atk. 503; Stokes v. Moore, cited by Mr. Coxe in a note to 1 P. Wms. 771. Forms are not regarded, and the statute is satisfied if the terms of the contract are in writing, and the names of the contracting parties appear. Clason's name was inserted in the contract by his authorized agent, and if it were admitted that the name of the other party was not there by their direction, yet the better opinion is, that Clason, the party who is sought to be charged, is estopped, by his name, from saying that the contract was not duly signed within the purview of the statute of frauds; and that it is sufficient, if the agreement be signed by the party to be charged.

It appears to me, that this is the result of the weight of authority both in the courts of law and equity.

In Ballard v. Walker (3 Johns. Cases, 60), decided in the Supreme Court, in 1802, it was held, that a contract to sell land, signed by the vendor only, and accepted by the other party, was binding on the vendor, who was the party there sought to be charged. So in Roget v. Merrit (2 Caines, 117) an agreement concerning goods signed by the seller, and accepted by the buyer, was considered a valid agreement, and binding on the party who signed it.

These were decisions here, under both branches of the statute, and the cases in the English courts are to the same effect.

In Saunderson v. Jackson (2 Bos. & Pull. 238) the suit was against the seller, for not delivering goods according to a memorandum signed by him only, and judgment was given for the plaintiff, notwithstanding the objection that this was not a sufficient note within the statute. In Champion v. Plummer (4 Bos. & Pull. 252) the suit was against the seller, who alone had signed the agreement. No objection was made that it was not signed by both parties, but the memorandum was held defective, because the name of the buyer was not mentioned at all, and consequently there was no certainty in the writing. Again, in Egerton v. Mathews (6 East, 307) the suit was on a memorandum for the purchase of goods, signed only by the defendant, who was the buyer, and it was held a good agreement within the statute. Lastly, in Allen v. Bennet (3 Taunton, 169) the seller was sued for the non-delivery of goods, in pursuance of an agreement signed by him only, and judgment was rendered for the plaintiff. In that case Ch. J. Mansfield made the observation, that "the cases of Egerton v. Mathews, Saunderson v. Jackson, and Champion v. Plummer, suppose the signature of the seller to be sufficient; and every one knows it is the daily practice of the Court of Chancery

to establish contracts signed by one person only, and yet a court of equity can no more dispense with the statute of frauds than a court of law can." So Lawrence, J., observed, that "the statute clearly supposes the probability of there being a signature by one person only."

If we pass from the decisions at the law to the courts of equity, we meet with the same uniform construction. Indeed, Lord Eldon has said (18 Vesey, 183) that chancery professes to follow courts of law in the construction of the statute of frauds.

In Hatton v. Gray (2 Chan. Cas. 164; 1 Eq. Cas. Abr. 21, pl. 10) the purchaser of the land signed the agreement, and not the other party, and yet the agreement was held by Lord Keeper North to be binding on him, and this too on a bill for a specific performance. So in Coleman v. Upcot (5 Viner, 527, pl. 17) the Lord Keeper Wright held, that an agreement concerning lands was within the statute, if signed by the party to be charged, and that there was no need of its being signed by both parties, as the plaintiff, by his bill for a specific performance, had submitted to perform what was required on his part to be performed.

Lord Hardwicke repeatedly adopted the same language. In Buckhouse v. Crosby (2 Eq. Cas. Abr. 32, pl. 44) he said he had often known the objection taken, that a mutual contract in writing signed by both parties ought to appear, but that the objection had as often been overruled; and in Welford v. Beazely (3 Atk. 503) he said there were cases where writing a letter, setting forth the terms of an agreement, was held a signing within the statute; and in Owen v. Davies (1 Ves. 82) an agreement to sell land, signed by the defendant only, was held binding.

The modern cases are equally explicit. In Cotton v. Lee, before the lords commissioners, in 1770, which is cited in 2 Bro. 564, it was deemed sufficient that the party to be charged had signed the agreement. So in Seton v. Slade (7 Vesey, 275) Lord Eldon, on a bill for a specific performance against the buyer of land, said that the agreement being signed by the defendant only, made him within the statute, a party to be charged. The case of Fowle v. Freeman (9 Vesey, 351) was an express decision of the master of the rolls, on the very point that an agreement to sell lands, signed by the vendor only, was binding.

There is nothing to disturb this strong and united current of authority but the observations of Lord Ch. Redesdale, in Lawrenson v. Butler (1 Sch. & Lef. 13), who thought that the contract ought to be mutual to be binding, and that if one party could not enforce it, the other ought not. To decree performance, when one party only was bound, would "make the statute really a statute of frauds, for it would enable any person who had procured another to sign an

agreement, to make it depend on his own will and pleasure whether it should be an agreement or not." The intrinsic force of this argument, the boldness with which it was applied, and the commanding weight of the very respectable character who used it, caused the courts for a time to pause. Lord Eldon, in 11 Vesey, 592, out of respect to this opinion, waived, in that case, the discussion of the point; but the courts have, on further consideration, resumed their former track. In Western v. Russell (3 Vesey & Beames, 192) the master of the rolls declared he was hardly at liberty, notwithstanding the considerable doubt thrown upon the point by Lord Redesdale, to refuse a special performance of a contract to sell land, upon the ground that there was no agreement signed by the party seeking a performance; and in Ormond v. Anderson (2 Ball & Beatty, 370) the present lord chancellor of Ireland (and whose authority, if we may judge from the ability of his decisions, is not far short of that of his predecessor) has not felt himself authorized to follow the opinion of Lord Redesdale. "I am well aware," he observes, "that a doubt has been entertained by a judge of this court, of very high authority, whether courts of equity would specifically execute an agreement where one party only was bound; but there exists no provision in the statute of frauds to prevent the execution of such an agreement." He then cites with approbation what was said by Sir J. Mansfield in Allen v. Bennet.

I have thought, and have often intimated, that the weight of argument was in favor of the construction that the agreement concerning lands, to be enforced in equity, should be mutually binding, and that the one party ought not to be at liberty to enforce at his pleasure an agreement which the other was not entitled to claim. It appears to be settled (Hawkins v. Holmes, 1 P. Wms. 770) that though the plaintiff has signed the agreement, he never can enforce it against the party who has not signed it. The remedy, therefore, in such case is not mutual. But, notwithstanding this objection, it appears from the review of the cases that the point is too well settled to be now questioned.

There is a slight variation in the statute respecting agreements concerning the sale of lands, and agreements concerning the sale of chattels, inasmuch as the one section (being the 4th section of the English, and the 11th section of our statute) speaks of the party, and the other section (being the 17th of English, and the 15th of ours) speaks of the parties to be charged. But I do not find from the cases that this variation has produced any difference in the decisions. The construction, as to the point under consideration, has been uniformly the same in both cases.

Clason, who signed the agreement, and is the party sought to be charged, is, then, according to the authorities, bound by the agree-

ment, and he cannot set up the statute in bar. But I do not deem it absolutely necessary to place the cause on this ground, though, as the question was raised and discussed, I thought it would be useful to advert to the most material cases, and to trace the doctrine through the course of authority. In my opinion, the objection itself is not well founded in point of fact.

The names of Bailey & Voorhees are as much in the memorandum as that of Clason. The words are, "Bought for *Isaac Clason,* of *Bailey & Voorhees,* 3000 bushels," etc.; and how came their names to be inserted? Most undoubtedly they were inserted by their direction and consent, and so it appears by the special verdict. The jury find, that when the bargain was closed, Townsend, the agent of Clason, did at the time, and in their presence, write the memorandum; and if so, were not their names inserted by their consent? Was not Townsend their agent for that purpose? If they had not assented to the memorandum, they should have spoken. But they did assent, for the memorandum was made to reduce the bargain to writing in their presence at the time it was closed. It was, therefore, as much their memorandum as if they had written it themselves. Townsend was, so far, the acknowledged agent of both parties. The auctioneer who takes down the name of a buyer, when he bids, is, *quoad hoc,* his agent. Emmerson v. Heelis, 2 Taunt. 38. The contract was, then, in judgment of law reduced to writing, and signed by both parties; and it appears to me to be as unjust as it is illegal, for Clason or his representatives to get rid of so fair a bargain on so groundless a pretext.

2. The remaining objection is that the memorandum was made with a lead pencil.

The statute requires a writing. It does not undertake to define with what instrument, or with what material, the contract shall be written. It only requires it to be in writing, and signed, etc.; the verdict here finds that the memorandum was written, but it proceeds further, and tells us with what instrument it was written, viz., with a lead pencil. But what have we to do with the kind of instrument which the parties employed when we find all that the statute required, viz., a memorandum of the contract in writing, together with the names of the parties?

To write is to express our ideas by letters visible to the eye. The mode or manner of impressing those letters is no part of the substance or definition of writing. A pencil is an instrument with which we write without ink. The ancients understood alphabetic writing as well as we do, but it is certain that the use of paper, pen, and ink was, for a long time, unknown to them. In the days of Job they wrote upon lead with an iron pen. The ancients used to write upon hard substances, as stones, metals, ivory, wood, etc., with a style

or iron instrument. The next improvement was writing upon waxed tables; until at last paper and parchment were adopted, when the use of the *calamus* or reed was introduced. The common law has gone so far to regulate writings, as to make it necessary that a deed should be written on paper or parchment, and not on wood or stone. This was for the sake of durability and safety; and this is all the regulation that the law has prescribed. The instrument or the material by which letters were to be impressed on paper or parchment has never yet been defined. This has been left to be governed by public convenience and usage; and as far as questions have arisen on this subject, the courts have, with great latitude and liberality, left the parties to their own discretion. It has accordingly been admitted (2 Bl. Com. 297; 2 Bos. & Pull. 238; 3 Esp. Rep. 180) that printing was writing within the statute, and (2 Bro. 585) that stamping was equivalent to signing, and (8 Vesey, 175) that making a mark was subscribing within the act. I do not find any case in the courts of common law in which the very point now before us has been decided, viz., whether writing with a lead pencil was sufficient; but there are several cases in which such writings were produced, and no objection taken. The courts have impliedly admitted that writing with such an instrument, without the use of any liquid, was valid. Thus in a case in Comyn's Reports (p. 451) the counsel cited the case of Loveday v. Claridge, in 1730, where Loveday, intending to make his will, pulled a paper out of his pocket, wrote some things down with ink, and some with a pencil, and it was held a good will. But we have a more full and authentic authority in a late case decided at doctors' commons (Rymes v. Clarkson, 1 Phillim. Rep. 22), where the very question arose on the validity of a codicil written with a pencil. It was a point over which the prerogative court had complete jurisdiction, and one objection taken to the codicil was the material with which it was written; but it was contended, on the other side, that a man might write his will with any material he pleased, *quocunque modo velit, quocunque modo possit,* and it was ruled by Sir John Nicholl, that a will or codicil written in pencil was valid in law.

The statute of frauds, in respect to such contracts as the one before us, did not require any formal and solemn instrument. It only required a note or memorandum, which imports an informal writing done on the spot, in the moment and hurry and tumult of commercial business. A lead pencil is generally the most accessible and convenient instrument of writing on such occasions, and I see no good reason why we should wish to put an interdict on all memoranda written with a pencil. I am persuaded it would be attended with much inconvenience, and afford more opportunities and temptation to parties to break faith with each other, than by allowing the writing

with a pencil to stand. It is no doubt very much in use. The courts have frequently seen such papers before them, and have always assumed them to be valid. This is a sanction not to be disregarded.

I am, accordingly, of opinion that the judgment of the Supreme Court ought to be affirmed.

This was the opinion of the court. (Elmendorf & Livingston, senators, dissenting.)

It was thereupon ordered, adjudged, and decreed, that the judgment of the Supreme Court be, in all things, affirmed, and that the defendant recover from the plaintiffs their double costs, to be taxed, and that the record be remitted, etc.

Judgment affirmed.

20 Cyc. 272-276 (76-96); 20 Cyc. 253 (60-61); 28 L. R. A. (N. S.) 680; W. P. 180 (25); 26 H. L. R. 276.

(ii.) Provisions of fourth section.

a. Special promise by an executor or administrator to answer damages out of his own estate.

BELLOWS *v.* SOWLES.

57 VERMONT, 164.—1884.

Assumpsit. Heard on demurrer to the declaration. The declaration alleged that plaintiff, a relative and heir at law of defendant's testator, being left out of the will of the testator, had employed counsel, etc., to contest the will, and that defendant, being executor and himself a legatee, and the husband of the principal legatee, had also employed counsel to defend the will, and that the parties met and agreed that if plaintiff would forbear to contest the will, defendant would pay the plaintiff the sum of five thousand dollars, and that although plaintiff did forbear and the will was duly probated, defendant failed and refused to pay the amount agreed on.

POWERS, J. Counsel for the defendant have demurred to the declaration in this case upon two grounds; first, that the consideration alleged is insufficient; secondly, that the promise not being in writing comes within, and is therefore not enforceable under, the statute of frauds.

It has been so often held that forbearance of a legal right affords a sufficient consideration upon which to found a valid contract, and that the consideration required by the statute of frauds does not differ from that required by the common law, it does not appear to us to be necessary to review the authorities or discuss the principle. As to the second point urged in behalf of the defendant, this case presents greater difficulties. Although the statute of frauds was enacted

two centuries ago, and even then was little more than a re-enactment of the pre-existing common law, and though cases have continually arisen under it, both in England and America, yet so confusing and at times inconsistent are the decisions, that its consideration is always attended with difficulty and embarrassment.

The best understanding of the statute is derived from the language itself, viewed in the light of the authorities which seem to us to interpret its meaning as best to attain its object. That clause of the statute under which this case falls, reads: "No action at law or in equity shall be brought . . . upon a special promise of an executor or administrator to answer damages out of his own estate."

This *special* promise referred to is, in short, any *actual* promise made by an executor or administrator, in distinction from promises implied by law, which are held not within the statute.

The promise must be "to answer *damages* out of his own estate." This phraseology clearly implies an obligation, duty, or liability on the part of the *testator's* estate, for which the executor promises to pay damages out of his *own* estate. The statute, then, was enacted to prevent executors or administrators from being fraudulently held for the debts or liabilities of the estates upon which they were called to administer. In this view of the case, this clause of the statute is closely allied, if not identical in principle, with the following clause, namely: "No action, etc., upon a special promise to answer for the debt, default, or misdoings of another." And so Judge Royce, in delivering the opinion of the court in Harrington v. Rich (6 Vt. 666), declares these two classes of undertakings to be "very nearly allied," and considers them together. This seems to us to be the true idea of this clause of the statute:—that the undertaking contemplated by it, like that contemplated by the next clause, is in the nature of a *guaranty;* and that reasoning applicable to the latter is equally applicable to the former.

We believe this view to be well supported by the authorities. Browne, in his work on the statute of frauds, p. 150, says: "In the fourth section of the statute of frauds, special promises of executors and administrators to answer damages out of their own estates appear to be spoken of as one class of that large body of contracts known as guaranties." And so on page 184, he interprets "to answer damages" as equivalent to *to pay debts of the decedent.* This seems to be the construction given to the statute by Chief Justice Redfield, in his work on Wills. Vol. 2, p. 290, *et seq.*

The Revised Statutes of New York, Vol. 2, p. 113, have improved upon the phraseology of the old statute as we have adopted it, by adding *or to pay the debts of the testator or intestate out of his own estate.*

If we are correct in this view of the relation between these two

clauses, the solution of the question presented by this case is comparatively easy.

It has been held in this State, that when the contract is founded upon a new and distinct consideration moving between the parties, the undertaking is original and independent, and not within the statute. Templeton v. Bascom, 33 Vt. 132; Cross v. Richardson, 30 Vt. 641; Lampson v. Hobart, 28 Vt. 697. Whether or not it would be safe to announce this as a general rule of universal application, it is a principle of law well fortified by authority, that where the *principal* or *immediate* object of the promisor is not to pay the debt of another, but *to subserve some purpose of his own,* the promise is original and independent, and not within the statute. Brandt Sur. 72; 3 Par. Cont. 24; Rob. Fr. 232; Emerson v. Slater, 22 How. 28. And this seems to be the real ground of the decisions above cited in the 28th and 30th Vt., in which the court seems to blend the two rules just laid down.

Pierpoint, J., in delivering the opinion of the court in Cross v. Richardson, *supra,* says: "The consideration must be not only sufficient to support the promise, but of such a nature as to take the promise out of the statute; and that requisite, we think, is to be found in the fact that it operates to the advantage of the promisor, and places him under a pecuniary obligation to the promisee, entirely independent of the original debt."

Apply this rule to this case. Here the main purpose of this promise was, not to answer damages (for the testator) out of his own estate, but was entirely to subserve some purpose of the defendant. The consideration did not affect the estate, but was a matter purely personal to the defendant. Here there was no liability or obligation on the part of the estate to be answered for in damages. It could make no difference to the *executor* of that estate whether it was to be divided according to the will, or by the law of descent. If the subject-matter of this contract had been something entirely foreign to this estate, no one would maintain that the defendant was not bound by it, because he happened to be named executor in this will. Here the subject-matter of the contract was connected with the estate, but in such a way that it was practically immaterial to the estate which way the question was decided. There exists, therefore, in this case, no sufficient, actual, primary liability to which this promise could be collateral. This seems to us to be the fairest interpretation of the law. The statute was passed for the benefit of executors and administrators; but it might be said of it, as has been said of the protection afforded to an infant by the law of contracts, that "it is a shield to protect, not a sword to destroy." If this class of contracts was allowed to be avoided under it, instead of being a prevention of frauds, it would become a powerful instrument for fraud. As in this

case the plaintiff would be deprived of his legal right to contest the will, by a party who has reaped all the benefits of the transaction, and is shielded from responsibility by a technicality. We do not believe this was the result contemplated by the statute.

The judgment of the County Court overruling the demurrer and adjudging the declaration sufficient is affirmed, and case remanded with leave to the defendant to replead on the usual terms.

20 Cyc. 159 (23); W. P. 214 (23).

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b. Any promise to answer for the debt, default, or miscarriage of another.

STERRETT, J. IN NUGENT *v.* WOLFE.

111 PENNSYLVANIA STATE, 471.—1886.

It is very evident that the statute was not intended to apply except in cases where, in addition to the promisor and promisee, there is also a third party to whose debt or undertaking the agreement of the promisor relates, and not even then unless the liability of the third party continues. In other words, the agreement, to be within the purview of the statute, must in a certain sense be a collateral and not an original undertaking. Independently of the debt or liability of the third party, there must, of course, be a good consideration for the collateral or subordinate agreement, such for example as a benefit or advantage to the promisor or an injury to the promisee. It is difficult, if not impossible, to formulate a rule by which to determine in every case whether a promise relating to the debt or liability of a third person is or is not within the statute; but, as a general rule, when the leading object of the promise or agreement is to become guarantor or surety to the promisee, for a debt for which a third party is and continues to be primarily liable, the agreement, whether made before or after, or at the time with the promise of the principal, is within the statute, and not binding unless evidenced by writing. On the other hand, when the leading object of the promisor is to subserve some interest or purpose of his own, notwithstanding the effect is to pay or discharge the debt of another, his promise is not within the statute.

As was said by Mr. Justice Strong in Maule v. Bucknell, 50 Pa. St. 39, 52, "It is undoubtedly true that a promise to answer for the debt or default of another is not within the statute, unless it be collateral to a continued liability of the original debtor. If it be a substitute,—an agreement by which the debt of another is extinguished, as where the creditor gives up his claim on his original debtor, and accepts the new promise in lieu thereof, it need not be

in writing. And, as the cases referred to show, it may be unaffected by the statute, though the original debt remains, if the promisor has received a fund pledged, set apart, or held for payment of the debt. But, except in such cases, and others perhaps of a kindred nature, in which the contract shows an intention of the parties that the new promisor shall become the principal debtor, and the old debtor become but secondarily liable, the rule, it is believed, may be safely stated, that while the old debt remains the new must be regarded as not an original undertaking, and therefore within the statute. At least this may be stated as a principle generally accurate. In Williams' Saund. 211, note, it is said: 'The question whether each particular case comes within the clause of the statute or not, depends not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise.'"

If one says to another, "deliver goods to A. and I will pay you," the verbal promise is binding, because A., though he receives the goods, is not responsible to the party who furnishes them. But, if instead of saying, "I will pay you," he says, "I will see you paid," or "I will pay you if he does not," or uses words equivalent thereto, showing that the debt is, in the first instance, the debt of A., the undertaking is collateral, and not valid unless in writing. In these latter cases, the same consideration, viz., the consideration of the promise of the principal is a good consideration for the promise of the surety or collateral promisor. The credit is given as well upon the original consideration of the principal as the collateral promise of the surety, and is a good consideration for both. Nelson v. Boynton, 44 Mass. 396, 400.

20 Cyc. 180 (8); W. P. 171 (10); 23 H. L. R. 136; 11 C. L. R. 355.

RAABE *et al v.* SQUIER *et al.*

148 NEW YORK, 81.—1895.

Action brought to recover the sum of $2,800, the balance claimed to be due on contracts between the defendants Squier and Whipple and the plaintiffs, in which the plaintiffs undertook to furnish the woodwork for ten houses which the defendants Squier and Whipple were building on West End avenue in the city of New York, which were owned by the defendants Jencks and Stokes.

HAIGHT, J. . . . The facts then as disclosed by the evidence are substantially as follows: Jencks and Stokes were the owners of the premises. Squier and Whipple were building the houses thereon for

them. Squier and Whipple entered into a contract with the plaintiffs to furnish the woodwork for the houses for the sum of $20,000. The payments were to be made in installments in cash, less ten per cent. discount, on the delivery of the material at the buildings. The contract specifically designated the material to be delivered upon each installment. The plaintiffs prepared the first installment of material, and delivered the same at the buildings, and then called upon the defendants, Squier and Whipple, for the first payment due them under the contract, but the same was delayed and not made for the space of about three months. The plaintiffs prepared and delivered the second installment of material, and also demanded payment for that, which was neglected and delayed. The plaintiffs then prepared the rest of the material called for by the contract, but refused to deliver the same until the installments furnished by them had been paid for. Under these circumstances the defendants Jencks and Stokes saw the plaintiffs and told them that they were the owners of the buildings; that they wanted them finished and that if the plaintiffs would go ahead and deliver the rest of the material they would see them paid therefor; that if Squier and Whipple did not pay they would take it out of the amount going to them and would pay the plaintiffs. It further appears that, relying upon this promise, the plaintiffs proceeded and delivered all the material called for by the contracts, but that the sum of $2,800 still remains due to them and unpaid.

The referee dismissed the complaint as to Jencks and Stokes upon the ground, as he says, that their promise to pay being oral was void under the statute of frauds and as to Squier and Whipple upon the ground that "before the delivery of any goods by the plaintiffs under the terms of the contract the plaintiffs refused to carry out or fulfill said contract on their part with the defendants Squier and Whipple."

Considering the last proposition first, we are at a loss to understand upon what evidence it is founded. It is true that the last batch of material was not delivered until December, but we are told that the delay in delivering was because of the non-payment of the amount due on former deliveries. The refusing to deliver an installment until a former installment had been paid for was not a breach of the contract on the part of the plaintiffs. As to the statute of frauds it appears to us that its provisions have no application to the case under consideration. In the first place the indebtedness at the time the promise was made has been paid. The promise, in so far as it is here sought to be enforced, related to the indebtedness thereafter to be created. The promisors were the owners of the buildings in process of construction. The woodwork furnished by the plaintiffs was for their benefit. The contractors had neglected to pay the

plaintiffs for the material furnished and they refused to deliver more, as they had the right to do. Under such circumstances the promise was made, and it was in reliance upon the promise that the plaintiffs delivered the rest of the woodwork. The promise thus made was original and founded upon a new consideration, that of the goods. It was beneficial, as we have seen, to the promisors, thus bringing the case within the rule stated by Finch, J., in White v. Rintoul (108 N. Y. 222, 227), in which he says: "Where the primary debt subsists and was antecedently contracted, the promise to pay it is original when it is founded on a new consideration moving to the promisor and beneficial to him, and such that the promisor thereby comes under an independent duty of payment irrespective of the liability of the principal debtor." Ackley v. Parmenter, 98 N. Y. 425; Prime v. Koehler, 77 N. Y. 91; Bayles v. Wallace, 56 Hun, 428.

The judgment should be reversed and a new trial granted, costs to abide the event. All concur. Judgment reversed.[1]

20 Cyc. 182 (14).

MAY *v.* WILLIAMS.

61 MISSISSIPPI, 125.—1883.

COOPER, J. It was not an error for the court below to permit an amendment to be made of the affidavit on which the writ of seizure was issued. Louisa Williams and her infant sisters were jointly interested under the contract with Mrs. May in the fruits of their labor. In the original affidavit Louisa Williams had demanded in her own name the interest of all the laborers in the crop, and the amendment was necessary to bring before the court all the joint-owners of the claim propounded. A suit to enforce a laborer's lien is, under the Code of 1880, c. 52, a proceeding partly *in rem* and partly *in personam*. A general judgment is rendered *in personam* for the amount found due, and the property seized is condemned to

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[1] "General rule to distinguish original from collateral promises formulated:

(1) An apparent promise to pay the debt of another is not collateral, (a) where it runs to the debtor only and not to the creditor; (b) where there never in fact was any primary debt at all; (c) and where once existing, it had ceased to exist at the date of the promise.

(2) Although the primary debt subsists, and there *is* a third person owing the debt, the promise to pay it is not collateral, when, for a new consideration, moving to the promisor and beneficial to him, such promisor assumes an independent duty of payment, irrespective of the liability of the principal debtor." Judge F. M. Finch, Synopsis of lectures on the Statute of Frauds, Ithaca, 1897. For an historical review of the development of the rules as to original and collateral promises in New York, see Judge Finch's opinion in White v. Rintoul, 108 N. Y. 222.

be sold for its satisfaction. It is the amount demanded and not the value of the property seized which determines the jurisdiction of the court. Code 1880, § 1365. In suits of this character the question of cost is left to the discretion of the presiding judge, and costs should be awarded in each case against the party by whom, in view of all the circumstances, it is equitable they should be borne. Code 1880, § 1369.

On the trial the defendant proposed to prove that in the spring of the year in which the crop sued for was planted, the husband of the plaintiff, Louisa Williams, was incarcerated in the jail of Noxubee County on the charge of grand larceny, and that Louisa Williams applied to her, the defendant, to become surety on his bail-bond, and verbally agreed that if the defendant would become so bound, the interest in the crop to be raised which belonged to Louisa and to her infant sisters should remain in the hands of the defendant to indemnify her against the default of the husband; that in consideration of such agreement the defendant became surety as requested; that Williams, the accused, had absconded, and that a judgment *nisi* had been rendered against the defendant for the sum of two hundred dollars upon the forfeited bond. Upon the objection of the plaintiffs the evidence was excluded by the court as being a parol promise to answer for the "debt or default or miscarriage of another," and, therefore, unenforceable under the statute of frauds.

There is great conflict of authority upon the question whether a parol promise to indemnify one who becomes surety for another at the request of the promisor is within that clause of the statute of frauds which declares that "no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt or default or miscarriage of another person, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him or her thereunto lawfully authorized." In England the courts have vacillated upon the question, and the courts of this country have, to a considerable extent, taken position with that view which at the time of the several decisions prevailed in England. In Thomas v. Cook (8 B. & C. 728) a promise to indemnify was held not to be within the statute. In Green v. Cresswell (10 Ad. & E. 453) the contrary view was announced. In Cripps v. Hartnoll (4 B. & S. 414) the distinction was drawn between those cases in which the promisee was surety upon a bond by which the principal was bound to answer a criminal charge and those in which the bond was given in a civil cause, the court saying that there was no implied contract on the part of a principal who was bound over to answer a criminal charge to indemnify his surety, and, therefore, that the promise of the

promisee did not come in aid of that of another person, for which reason it was decided that the promise in that case was not obnoxious to the statute. In Wildes v. Dudlow (L. R. 19 Eq. 198) Vice-Chancellor Malins treated the case of Green v. Cresswell as virtually overruled by Cripps v. Hartnoll, and in Reader v. Kingham (13 C. B. N. S. 344) it was held that a promise, to be within the statute, must be made to the promisee to pay a debt due by another to him. It may therefore be considered that in England Green v. Cresswell has been overruled, and the doctrine of Thomas v. Cook re-established.

In this country the States of Massachusetts, Maine, New Hampshire, Georgia, Kentucky, Iowa, Indiana, Minnesota, Wisconsin, Vermont, and Connecticut have followed the authority of Thomas v. Cook, while South Carolina, North Carolina, Missouri, Alabama, and Ohio have adhered to the rule announced in Green v. Cresswell. See authorities cited in Browne on the Statute of Frauds, §§ 161–161 c; Anderson v. Spence, 72 Ind. 315. In this conflict of American authority, produced in no inconsiderable degree by the inconstancy of the English courts, the weight in numbers is in favor of the rule that such promises are not within the statute; but an examination of the cases holding this view discloses equally as great conflict among themselves as to the principle upon which the decisions are rested. In Cripps v. Hartnoll a promise to indemnify was held not to be within the statute, because the bond was given in a criminal proceeding, and in such cases, it was said, there is no contract on the part of the person bailed to indemnify the surety. In Holmes v. Knights (10 N. H. 175) it was suggested that the principal would not be bound to indemnify the surety unless he had requested him to become bound; but, passing this question by, the decision was put upon the ground that the obligation of the principal, if it existed at all, was an implied one, and its existence would not prevent the surety from proceeding against the parol promisor, who was bound by express agreement, the court saying that if either was to be deemed collateral, the liability of the principal, in such a case, would seem to be collateral to that of the defendant. In Reader v. Kingham (13 C. B. N. S. 344), Wildes v. Dudlow (L. R. 19 Eq. 198), Aldrich v. Ames (9 Gray 76), and Anderson v. Spence (72 Ind. 315), and many other cases, the promise is held not to be within the statute, because it is said not to be made to the creditor, but to one who is debtor, while in Dunn v. West (5 B. Mon. 376) and Lucas v. Chamberlain (8 B. Mon. 276) the promise was held to be enforceable, because the implied obligation of the principal to indemnify his surety is said to arise from a subsequent fact, to wit, the payment of the debt by the surety. Upon some one or the other of these principles the cases holding this view which are most approved by the text-writers are based, though there are others in which other reasons are

given, as in Read v. Nash, 1 Wils. 305; D'Wolf v. Rabaud, 1 Peters, 476; Emerson v. Slater, 22 How. U. S. 28.

Notwithstanding the number of cases in which these views are announced, we are satisfied, upon an examination of the subject, to take our stand with those courts which hold such promises to be within the statute and unenforceable, unless evidenced by writing. We do not assent to the proposition that a principal in a bail-bond is not under an implied contract to indemnify his surety. He knows that the law requires some one to be bound for his appearance as a condition to his discharge from custody; he executes the instrument by which the surety is bound, and by the bond he becomes bound as principal to that surety. By executing the bond and accepting the benefits which flow from, he assumes the duties and obligations which spring out of, his engagement, whether due to the State or to his surety. Why should a different rule be applied where one is bound to appear to answer a criminal charge than would be applicable if the thing to be done was the performance of physical labor, the proper administration of an estate, or the doing of any other act by the principal? Where the engagement is made with the knowledge and consent of the principal debtor, there is in point of law an implied request from the latter to the surety to intervene in the principal's behalf if the latter makes default, and money paid by the surety for the purpose of discharging the claim against the principal is money paid for the use of the principal at his request, which may be recovered from the latter. Exall v. Partridge, 8 T. R. 308.

It cannot be said that the promise to indemnify the surety is made to him as debtor and not as creditor. It is true that both the principal and surety are bound to the fourth person, the State; but the contract of the promisor is not to discharge that obligation. He assumes no duty or debt to the State, nor does he agree with the promisee to pay to the State the debt which may become due to it if default shall be made by the principal in the bond. It is only when the promisee has changed his relationship of debtor to the State and assumed that of creditor to his principal by paying to the State the penalty for which both he and his principal were bound that a right arises to go against the guarantor on his contract. It is to one who is under a conditional and contingent liability that the promise is made; but it is to him as creditor, and not as debtor, that a right of action arises on it. Nor do we think it sufficient to take the case from the operation of the statute that the liability of the principal arises by implication rather than by express contract. The statute makes no distinction between a debt due on an implied and one due by express contract. It is the existence of the debt against the principal, and not the manner in which it originates, that makes voidable a parol promise by another to become responsible for

its payment. Nor are we able to perceive that the contract of the promisee is anterior to that of the principal in the bond. Until the surety assumes responsibility by executing the bond, the agreement of the promisor to indemnify is only a proposition which may be withdrawn by him or declined by the promisee. It is only when the proposition is acted on by the promisee that the contract becomes absolute; but at the very instant that it thus becomes a contract there also springs up an implied contract of the principal to do and perform the same act, viz., to indemnify the surety against loss. It arises at the same moment, exists to the same extent, is supported by the same consideration, broken at the same instant, and is discharged by the same act, whether it be done by the principal in the bond or by the promisee in the contract to indemnify. It is the debt of the principal; and, being his debt, no third person can be bound for its payment unless the contract be evidenced by writing. This, we think, is the fair import of the statute and it ought not to be refined or frittered away.

Judgment affirmed.

20 Cyc. 180 (8); 20 Cyc. 178–179 (6–7); W. P. 171 (10); 2 C. L. R. 104.

TIGHE *v.* MORRISON.

116 NEW YORK, 263.—1889.

Plaintiff, at the request of defendant signed an administrator's bond (running to the People of the State of New York), as surety for Dowdall, administrator; and defendant orally promised to save plaintiff from any loss plaintiff might sustain by thus signing. Dowdall having later defaulted as administrator, and plaintiff having been compelled to pay $1200 therefor, sued defendant upon the latter's oral guaranty.

VANN, J. . . . While the bond was given to the People, who stand for "the creditor," as that word is used in the authorities, the promise in question was not made to them. Such a promise would have been collateral to the main obligation. But this promise was not made to the creditor, and at the time it was made there was no liability of the third person in existence to which it could be collateral. It was not a promise to answer for the debt, default or miscarriage of another, for which that other was, at the time, liable to the promisee, although he was liable to the creditor, which is unimportant. It was an original promise that certain things should be done by the third person. As there was no original liability on the part of Dowdall to which the defendant's promise could be collateral, the case falls within the first class named by Judge Comstock in his noted classification in Mallory v. Gillett [21 N. Y. 412]. Moreover, the rule

seems to be well settled that a promise not made to the person entitled to enforce the liability assumed by the promisor is not within the statute. The special, which means simply the express, promise was not made to the People, who, as the obligees named in the bond, were entitled to enforce it, but to the plaintiff, who had no such right. It was not a promise to answer for the default of one who owed any duty to the plaintiff, for Dowdall had neither expressly nor impliedly entered into any agreement with him. The duty owed by Dowdall was to the People only, standing as the creditor or fourth person. The following authorities are cited in support of this position: Harrison v. Sawtel (10 Johns. 242); Chapin v. Merrill (4 Wend. 657); Barry v. Ransom (12 N. Y. 462); Mallory v. Gillett (21 id. 412); Sanders v. Gillespie (59 id. 250, 252); McCraith v. National Mohawk Valley Bank (104 id. 414); Thomas v. Cook (8 Barn. & Cres. 728); Reader v. Kingham (13 C. B. [N. S.] 344); Cripps v. Hartnoll (4 B. & S. 414; 10 Jur. [N. S.] 200); Aldrich v. Ames (9 Gray, 76); Smith v. Sayward (5 Me. 504); Jones v. Shorter (1 Ga. 294); Birkmyr v. Darnell (1 Smith's L. C. 522, and cases cited in note on page 550.)

There are cases holding the opposite doctrine, the most noted of which are Green v. Cresswell (10 Ad. & Ellis, 453) and Kingsley v. Balcome (4 Barb. 131). The former, which is responsible for much of the confusion existing upon the subject, can no longer be regarded as the law in the country where it was decided, as will appear from the later English cases. (Fitzgerald v. Dressler, 6 Com. B. [N. S.] 374; Reader v. Kingham, *supra;* Batson v. King, 4 H. & N. 739; Cripps v. Hartnoll, *supra;* Wilkes v. Dudlow, L. R., 19 Eq. Cas. 198). . . .

20 Cyc. 179 (7); W. P. 171 (10); 3 H. L. R. 233.

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c. Agreement made in consideration of marriage.

WELD *v.* WELD.

71 KANSAS, 622.—1905.

BURCH, J. Judith R. Kidder executed and delivered to Augustus Weld her promissory note for a sum of money, and secured its payment by a mortgage upon her real estate. Subsequently she married him, in consideration of his parol agreement that the marriage should operate as a satisfaction of the note. Still later he brought an action against her to recover on the note and to foreclose the mortgage. She pleaded payment, and upon a trial the jury returned a general verdict in her favor, and made answers to special questions as follows:

"Question No. 1. Did the plaintiff and the defendant Judith R. Weld (then Judith R. Kidder), before they were married, and after the note in suit had been given, enter into a parol contract or agreement whereby it was mutually agreed between them that, in consideration the said Judith would thereafter marry the plaintiff, the note in suit should upon such marriage be by the said parties mutually regarded as paid or satisfied? Ans. Yes."

"Question No. 2. If you answer the preceding question 'yes,' then did the defendant Judith R. Weld, in pursuance of such alleged contract, and as a performance thereof on her part, marry the plaintiff? Ans. Yes."

Judgment was rendered for the defendant for costs. It is now urged that the evidence supporting the plea of payment was inadmissible, because the contract, being oral, is within the statute of frauds, and marriage is not a sufficient part performance to remove the bar, and that the evidence admitted was not sufficient to sustain the verdict.

It is true the statute of frauds provides that no action shall be brought to charge any person upon any agreement made upon consideration of marriage, unless the agreement upon which the action is brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him or her lawfully authorized. Gen. St. 1901, § 3174.

It is likewise true that authorities may be found to the effect that generally marriage is not a sufficient part performance to avoid the effect of the statute. But there is no question of part performance in this case. The contract was fully executed when the defendant married the plaintiff. Nothing further was to be done by either party to satisfy her obligation. The agreement was not that the plaintiff would after marriage deliver money or property or securities to the defendant in consideration of the marriage, or that he would after marriage execute and deliver to her legal documents affecting her property rights. It simply was that the debt should be paid when they were married.

Some of the evidence on behalf of the defendant as given by different witnesses is as follows: "They were out in the yard, and they came into the house, and he put his hand on her shoulder and said: 'Well, Anna, you needn't worry about the debt; after we are married the debt will be paid.' About three weeks after they were married they came back to our house. She and I were preparing something for dinner. We were in the dining room, and he was outside pitching a tent. He came into the room. He slapped her on the shoulder, and he said to me: 'Anna need not worry no more about the debt; her mortgage is paid.' We were talking, he and I and his wife, about the indebtedness on the place. My recollection is now that he told

her that there was no indebtedness on the place. Right then I said to him that to protect Anna, his wife, he ought to cancel the mortgage. He said that would be the first thing to do when they got home." The statute of frauds does not render void the verbal contracts to which it refers. They are valid for all purposes except that of suit. Stout v. Ennis, 28 Kan. 713. The parties may, if they desire, perform them, and, when performed, the statute has no application to them. 29 A. & E. Encycl. of L., 829, 941.

The plaintiff argues the case as if the contract were that he should enter of record a satisfaction of the mortgage. Such, however, was not the tenor of the agreement, and that duty followed, upon demand being made, whenever the debt was paid. Gen. St. 1901, § 4224. Since the parol evidence introduced established a contract fully performed, it was competent. The evidence might perhaps have been made the basis of different conclusions as to the existence of the contract relied upon as a defense to the action. It was therefore properly submitted to the jury for interpretation. The jury has performed its duty in that respect, and the trial judge has approved the result. Hence this court will not interfere.

Other assignments of error all converge in the proposition first discussed above, and need not be separately considered.

The judgment of the district court is affirmed. All the Justices concurring.[1]

20 Cyc. 302 (69); 19 H. L. R. 58.

ULLMAN *v.* MEYER.

10 FEDERAL REPORTER, 241.—1882.

(Circuit Court, S. D., N. Y.)

Motion for a new trial.

WALLACE, D. J. I am constrained to hold that the defendant was erroneously precluded from the benefit of his defence under the statute of frauds on the trial of the action, and that the construction of the statute, which, upon a hasty reading seemed correct, cannot be maintained. The case turns upon the construction of the statute of frauds, the phraseology of which differs from that of the statute of Charles II. It is stated in Parsons on Contracts, vol. 3, p. 3,

[1] Marriage is not such part performance of an oral ante-nuptial contract, the sole consideration of which is marriage, as to take it out of the operation of the Statute of Frauds, and the contract cannot be specifically enforced in a court of equity.—Hunt v. Hunt, 171 N. Y. 396 (Syllabus).

For review of cases of oral contracts based upon consideration of marriage, see Kramer v. Kramer, 90 N. Y. Appellate Division, 176 (reversed 181 N. Y. 477). Upon marriage as constituting a consideration, see 7 C. L. R. 223.

that although provisions substantially similar have been made by the statutes of this country, in no one State is the English statute exactly copied.

It was alleged in the present case, and the evidence tended to show, that by the terms of the agreement of marriage between the parties, the marriage was not to take place until sometime after the expiration of one year. It was held that, by force of the exception in the third section of our statute, promises to marry were not required to be in writing under any circumstances, the view being taken that it was the intention of the statute to withdraw agreements to marry altogether from its operation.

As an original proposition it might be debated whether the statute of frauds was ever intended to apply to agreements to marry. They are agreements of a private and confidential nature, which, in countries where the common law prevails, are usually proved by circumstantial evidence, and at the time the English statute was passed were not actionable at law, but were the subjects of proceedings in the ecclesiastical courts to compel performance of them. Nevertheless, at an early day after such actions became cognizable in courts of law the defence of the statute of frauds was interposed, under that clause of the statute which denies a right of action upon any agreement made upon consideration of marriage unless the agreement is in writing; and though it was held that such clause only related to agreements for marriage settlements, there seems to have been no doubt in the minds of the judges that promises to marry were within the general purview of the statute. In our own country, in Derby v. Phelps, 2 N. H. 515, the question was directly decided, and it was held that although the defence could not be maintained under the marriage clause of the statute, it was tenable under the clause requiring all agreements not to be performed within a year to be in writing. To the same effect are Nichols v. Weaver, 7 Kan. 373, and Lawrence v. Cooke, 56 Me. 193.

The question has never been presented in our own State, and the ruling upon the trial was made under the impression that the exception in the third clause of our statute was meaningless, unless intended to relate to all the clauses. It was entirely unnecessary if limited to the particular clause in which it is placed, because by the settled construction of the statute the clause did not apply to the excepted class of promises. 1 Ld. Raym. 387; 1 Strange, 34. When English statutes, such as the statute of frauds, have been adopted into our own legislation, the known and settled construction of these statutes has been considered as silently incorporated into the acts. Pennock v. Dialogue, 2 Pet. 1.

A more careful examination has, however, satisfied me that the only purpose of inserting the exception was by way of explanation,

and to remove any doubt as to the meaning of the clause by incorporating into it expressly what would otherwise have been left to implication. This conclusion is more reasonable than the supposition that so important an innovation upon the statute of frauds would have been engrafted so ambiguously. If it had been intended to exclude promises of marriage altogether from the operation of the statute, it could have been plainly evinced by inserting the exception where it would naturally apply to all the classes of promises required to be in writing; as it is, it more obviously refers to the marriage clause, and the class of promises covered by that clause. It has no necessary relation to the other classes of promises. While the letters of the parties show a marriage engagement, the terms of the engagement and the time of the marriage are not indicated sufficiently to take the case out of the statute. The evidence offered to show that the promise of the defendant was not, by its terms, to be performed within a year, was sufficient to present a question of fact for the jury.

As this question was withdrawn from their consideration, there must be a new trial.[1]

5 Cyc. 999 (8); 20 Cyc. 199 (4–5); W. P. 177 (19); 14 H. L. R. 603.

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d. Contract for sale of lands or hereditaments, or any interest in or concerning them.

HEYN *v.* PHILIPS.

37 CALIFORNIA, 529.—1869.

Appeal from the District Court, Third Judicial District, Alameda County. Judgment for defendant. Plaintiff appeals.

SAWYER, C. J. The question in this case is, whether the contract sued on and proved is a contract "for the sale of any lands, or interest in lands," within the meaning of the eighth section of the statute of frauds, and which is required to be in writing, and subscribed by the party to be charged.

The contract alleged is, that defendant employed said plaintiff to negotiate a sale of certain described lands, and find a purchaser for the same; that it was

"stipulated and agreed by and between said defendant and said plaintiff, that if said plaintiff would and should, within ten days from said last-named day, find a purchaser or purchasers for said land, at the price of two hundred dollars per acre, that the said defendant would sell and convey the same for that sum to such purchaser or purchasers, and that said plaintiff might and should have for his services in making such negotiation and finding a purchaser or

[1] *Contra*, Brick v. Gannar, 36 Hun, 52; Lewis v. Tapman, 90 Md. 294.

purchasers, all that might or could be obtained from such purchaser or purchasers over said sum of two hundred dollars per acre;"

that plaintiff found a purchaser at that sum and four thousand dollars over; that said purchaser tendered the money to defendant and demanded a conveyance, and that said defendant refused to receive said sum, or make a conveyance, whereby plaintiff was prevented from receiving the said excess of four thousand dollars as compensation for his services.

It does not appear to us that this is a contract for the sale of land, or an interest in land, within the meaning of the statute of frauds. It was a mere contract of employment between the plaintiff and defendant. There was no sale of land from the defendant to the plaintiff. The plaintiff was simply employed to find a purchaser for defendant's land at a given price to be realized by defendant, and the compensation to be received by plaintiff was to be such sum as he could get for the land over the given price. It is true that defendant agreed that in case a purchaser should be found willing to pay the given price or a larger sum, he would convey to such purchaser upon the receipt of the money so as to enable plaintiff to realize the compensation, and he did not agree to pay anything himself, but this was still but a mode of ascertaining and obtaining a compensation for plaintiff's services. The plaintiff had no interest, and was to have no interest whatever in the land, *as such*. The contract was substantially one of employment to find a purchaser of land, and not as between the parties a sale or agreement to sell land, or any interest in land. The subject-matter of the contract was the business of finding a party who would purchase the land for a given price and such sum over as would compensate the plaintiff for his services. He found a purchaser, and he was prevented from receiving his compensation by the refusal of the defendant to enter into the contract of sale with the purchaser found by plaintiff.

We think the judgment and order denying a new trial should be reversed and a new trial had, and it is so ordered.[1]

20 Cyc. 234–235 (34–35); W. P. 174 (15).

[1] In Bates v. Babcock, 95 Cal. 479, the court said: "A partnership may be formed for the purpose of dealing in lands, as well as for dealing in personal estate, or for engaging in professional, or commercial, or manufacturing occupations. Like any other contract of partnership, it is an agreement to share in the profit and loss of certain business transactions. Such a partnership may be formed for the purpose of buying and selling land generally, or it may be limited to a speculation upon a single venture. Dudley v. Littlefield, 21 Me. 422; Chester v. Dickerson, 54 N. Y. 1, 13 Am. Rep. 550; Williams v. Gillies, 75 N. Y. 201. Whether such a partnership can be formed, except by an agreement in writing, has been the subject of conflicting decisions. There is a dictum in Gray v. Palmer, 9 Cal. 639, to the effect that it must be in writing, for which Story on Partnership, section 83, is cited as authority; and

e. Agreement not to be performed within the space of one year from the making thereof.

WARNER *v.* TEXAS & PACIFIC RY. CO.

164 UNITED STATES, 418.—1896.

This was an action brought May 9, 1892, by Warner against the Texas & Pacific Railway Company, a corporation created by the laws of the United States, upon a contract made in 1874, by which it was agreed between the parties that, if the plaintiff would grade the ground

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in Smith v. Burnham, 3 Sum. 458, it was so held by that distinguished jurist. The great weight of modern authority, however, is in support of the rule that such a partnership may be formed in the same mode as in any other, and that its existence may be established by the same character of evidence. . . . Irrespective of any decision, however, an agreement of this character cannot be said to contravene the provisions of the Statute of Frauds. It does not contemplate any transfer of land from one party to the other, or the creation of any interest or estate in lands. In one sense, the parties to such an agreement may be said to have an interest in the lands that are to be purchased under the agreement,—that sense in which the beneficiary, under a trust for the sale of real estate, and payment to him of the proceeds of the sale, has an interest in the land; but it is only a pecuniary interest resulting from the sale and a right to have the land sold, rather than an interest in the land itself." See also 5 Mich. L. R. 698; 16 L. R. A. 745; 33 L. R. A. (N. S.) 883; Lilienthal, Oral agreements for real estate copartnerships, 13 H. L. R. 455.

In McKnight v. Bell, 135 Pa. 358, it was held: "A parol partition of lands between tenants in common is not a sale or transfer of lands, within the Statute of Frauds. If tenants in common, intending to make a partition of their lands, run a line, which is marked on the ground as a division line, and actually take possession of their respective parts in pursuance thereof, and the partition is fully executed between them, it is sufficient to vest the title in severalty." For cases accord and contra see 30 Cyc. 160–161 nn. 73–79.

In Dougherty v. Catlett, 129 Ills. 431, it was held: "That the Statute of Frauds embraces equitable as well as legal interests in land is well settled. Browne on Statute of Frauds, sec. 229. As said by Mr. Justice Story in Smith v. Burnham, 3 Sumner, 435, 'a contract for the conveyance of lands is a contract respecting an interest in lands. It creates an equitable estate in the vendee in the very lands, and makes the vendor a trustee for him. A contract for the sale of an equitable estate in lands, whether it be under a contract for the conveyance by a third party, or otherwise, is clearly a sale of an interest in lands, within the Statute of Frauds.' See also Richards v. Richards, 9 Gray, 313; Hughes v. Moore, 7 Cranch, 176; Simms v. Killian, 12 Ired. 252; Dial v. Crain, 10 Texas, 444; Catlett v. Dougherty, 21 Ill. App. 116; Jevne v. Osgood, 57 Ill. 340."

In Parsons v. Phelan, 134 Mass. 109, the court held: "By the Statute of Frauds, no action can be brought upon a contract for the sale of lands, or of any interest in or concerning lands, unless the contract, or some memorandum thereof, is in writing. Gen. Sts. c. 105, sec. 1. And no trust concerning lands, except such as may arise or result by implication of law, can be created or declared, unless by an instrument in writing. Gen. Sts. c. 100, sec. 19. In the case before us, the evidence tended to show that, in 1880, a parcel of

for a switch, and put on the ties, at a certain point on the defendant's railroad, the defendant would put down the rails, and maintain the switch for the plaintiff's benefit for shipping purposes as long as he needed it. The defendant pleaded that the contract was oral and within the statute of frauds, because it was "not to be performed within one year from the making thereof," and because it was "a grant or conveyance by this defendant of an estate of inheritance, and for a term of more than one year, in lands."

At the trial, the plaintiff, being called as a witness in his own behalf, testified that in 1874 the defendant's agent made an oral contract with him, by which it was agreed that, if he would furnish the ties and grade the ground for the switch, the defendant would put down the iron rails and maintain the switch for the plaintiff's benefit for shipping purposes, as long as he needed it; that the plaintiff immediately graded the ground for the switch, and got out and put down the ties, and the defendant put down the iron rails, and established the switch; and that the plaintiff, on the faith of the continuance of transportation facilities at the switch, put up a large sawmill, bought many thousand acres of land and timber rights and the water privileges of Big Sandy creek, made a tram road three miles long from the switch to the creek, and otherwise expended large sums of money, and sawed and shipped large quantities of lumber, until the defendant, on May 19, 1887, while its road was operated by receivers, tore up the switch and ties, and destroyed his transportation facilities, leaving his lands and other property without any connection with the railroad. His testimony also tended to prove that he had thereby been injured to the amount of more than $50,000, for which the defendant was liable, if the contract sued on was not within the statute of frauds.

On cross-examination, the plaintiff testified that when he made the contract he expected to engage in the manufacture of lumber at this place for more than one year, and to stay there, and to have a site for lumber there, as long as he lived; and that he told the defendant's agent, in the conversation between them at the time of making the contract, that there was lumber enough in sight on the railroad to run a mill for ten years, and by moving back to the creek there would be enough to run a mill for twenty years longer.

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land in Lynn was about to be sold by auction; and that the plaintiff and defendant made an oral contract that the defendant should bid off and buy the estate upon the joint account of both parties, in equal shares. It is clear upon the authorities that such a contract is within the statutes above cited; and that the plaintiff cannot enforce a trust in his favor in land after it was conveyed to the defendant, or maintain an action at law for a breach of the contract. Fickett v. Durham, 109 Mass. 419; Wetherbee v. Potter, 99 Mass. 354; Smith v. Burnham, 3 Sumner, 435."

No other testimony being offered by either party bearing upon the question whether the contract sued on was within the statute of frauds, the Circuit Court, against the plaintiff's objection and exception, ruled that the contract was within the statute, instructed the jury to find a verdict for the defendant, and rendered judgment thereon, which was affirmed by the Circuit Court of Appeals, upon the ground that the contract was within the statute of frauds, as one not to be performed within a year. (13 U. S. App. 236, 54 Fed. 922.) The plaintiff sued out his writ of error.

MR. JUSTICE GRAY, after stating the case, delivered the opinion of the court.

The statute of frauds of the State of Texas, re-enacting, in this particular, the English statute of 29 Car. II. c. 3, § 4 (1677), provides that no action shall be brought "upon any agreement which is not to be performed within the space of one year from the making thereof," unless the "agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person by him thereunto lawfully authorized." Tex. St. January 18, 1840; 1 Pasch. Dig. (4th ed.) art. 3875; Rev. St. 1879, art. 2464; Bason v. Hughart, 2 Tex. 476, 480.

This case has been so fully and ably argued, and the construction of this clause of the statute of frauds has so seldom come before this court, that it will be useful, before considering the particular contract now in question, to refer to some of the principal decisions upon the subject in the courts of England, and of the several States.

In the earliest reported case in England upon this clause of the statute regard seems to have been had to the time of actual performance in deciding that an oral agreement that, if the plaintiff would procure a marriage between the defendant and a certain lady, the defendant would pay him fifty guineas, was not within the statute; Lord Holt saying: "Though the promise depends upon a contingent, the which may not happen in a long time, yet, if the contingent happen within a year, the action shall be maintainable, and is not within the statute." Francam v. Foster, (1692) Skin. 326; S. C., Holt, 25.

A year later, another case before Lord Holt presented the question whether the words, "agreement not to be performed within one year," should be construed as meaning every agreement which *need* not be performed within the year, or as meaning only an agreement which *could* not be performed within the year, and thus, according as the one or the other construction should be adopted, including or excluding an agreement which might or might not be performed within the year, without regard to the time of actual performance. The latter was decided to be the true construction.

That was an action upon an oral agreement, by which the defendant promised, for one guinea paid, to pay the plaintiff so many at the day of his marriage; and the marriage did not happen within the year. The case was considered by all the judges. Lord Holt "was of opinion that it ought to have been in writing, because the design of the statute was, not to trust to the memory of witnesses for a longer time than one year." But the great majority of the judges were of opinion that the statute included those agreements only that were impossible to be performed within the year, and that the case was not within the statute, because the marriage might have happened within a year after the agreement; and laid down this rule: "Where the agreement is to be performed upon a contingent, and it does not appear within the agreement that it is to be performed after the year, then a note in writing is not necessary, for the contingent might happen within the year; but where it appears by the whole tenor of the agreement that it is to be performed after the year, there a note is necessary." Peter v. Compton, (1693) Skin. 353; S. C., Holt, 326, cited by Lord Holt in Smith v. Westall, 1 Ld. Raym. 316, 317; Anon., Comyn, 49, 50; Comb. 463.

Accordingly, about the same time, all the judges held that a promise to pay so much money upon the return of a certain ship, which ship happened not to return within two years after the promise made, was not within the statute, "for that by possibility the ship might have returned within a year; and although by accident it happened not to return so soon, yet, they said, that clause of the statute extends only to such promises where, by the express appointment of the party, the thing is not to be performed within a year." Anon., 1 Salk. 280.

Again, in a case in the king's bench in 1762, an agreement to leave money by will was held not to be within the statute, although uncertain as to the time of performance. Lord Mansfield said that the law was settled by the earlier cases. Mr. Justice Denison said: "The statute of frauds plainly means an agreement not to be performed within the space of a year, and expressly and specifically so agreed. A contingency is not within it; nor any case that depends upon contingency. It does not extend to cases where the thing only may be performed within the year; and the act cannot be extended further than the words of it." And Mr. Justice Wilmot said that the rule laid down in 1 Salk. 280, above quoted, was the true rule. Fenton v. Emblers, 3 Burrows, 1278; S. C., 1 W. Bl. 353.

It thus appears to have been the settled construction of this clause of the statute in England, before the Declaration of Independence, that an oral agreement which, according to the intention of the parties, as shown by the terms of the contract, might be fully performed within a year from the time it was made, was not within the

statute, although the time of its performance was uncertain, and might probably extend, and be expected by the parties to extend, and did in fact extend, beyond the year.

The several States of the Union, in re-enacting this provision of the statute of frauds in its original words, must be taken to have adopted the known and settled construction which it had received by judicial decisions in England. Tucker v. Oxley, 5 Cranch, 34, 42; Pennock v. Dialogue, 2 Pet. 1, 18; McDonald v. Hovey, 110 U. S. 619, 628. And the rule established in England by those decisions has ever since been generally recognized in England and America, although it may, in a few instances, have been warped or misapplied.

The decision in Boydell v. Drummond (1809) 11 East, 142, which has been sometimes supposed to have modified the rule, was really in exact accordance with it. In that case the declaration alleged that the Boydells had proposed to publish by subscription a series of large prints from some of the scenes of Shakespeare's plays, in eighteen numbers containing four plates each, at the price of three guineas a number, payable as each was issued, and one number, at least, to be annually published after the delivery of the first; and that the defendant became a subscriber for one set of prints, and accepted and paid for two numbers, but refused to accept or pay for the rest. The first prospectus issued by the publishers stated certain conditions, in substance as set out in the declaration, and others showing the magnitude of the undertaking, and that its completion would unavoidably take a considerable time. A second prospectus stated that one number, at least, should be published annually, and the proprietors were confident that they should be enabled to produce two numbers within the course of every year. The book in which the defendant subscribed his name had only, for its title, "Shakespeare Subscribers. Their signatures," without any reference to either prospectus. The contract was held to be within the statute of frauds, as one not to be performed within a year, because, as was demonstrated in concurring opinions of Lord Ellenborough and Justices Grose, LeBlanc, and Bayley, the contract, according to the understanding and contemplation of the parties, as manifested by the terms of the contract, was not to be fully performed (by the completion of the whole work) within the year; and consequently, a full completion within the year, even if physically possible, would not have been according to the terms or the intent of the contract, and could not have entitled the publishers to demand immediate payment of the whole subscription.

[The court then discusses Wells v. Horton, 4 Bing. 40; Souch v. Strawbridge, 2 C. B. 808; Murphy v. O'Sullivan, 11 Ir. Jur. (N. S.) 111; McGregor v. McGregor, 21 Q. B. D. 124.]

The cases on this subject in the courts of the several States are generally in accord with the English cases above cited. They are so

numerous, and have been so fully collected in Browne on the Statute of Frauds (5th ed. c. 13), that we shall refer to but few of them, beyond those cited by counsel in the case at bar.

[The court then states Peters v. Westborough, 19 Pick. 364.]

In many other States, agreements to support a person for life have been held not to be within the statute. Browne, St. Frauds, c. 13, § 276. The decision of the Supreme Court of Tennessee in Deaton v. Coal Co. (12 Heisk, 650), cited by the defendant in error, is opposed to the weight of authority.

[The court then discusses Roberts v. Rockbottom Co., 7 Met. (Mass.) 46; Blanding v. Sargent, 33 N. H. 239; Hinckley v. Southgate, 11 Vt. 428; Linscott v. McIntire, 15 Me. 201; Herrin v. Butters, 20 Me. 119; Broadwell v. Getman, 2 Denio (N. Y.) 87; Pitkin v. Long Island Railroad Co., 2 Barb. Ch. (N. Y.) 221; Kent v. Kent, 62 N. Y. 560; Saunders v. Kastenbine, 6 B. Mon. (Ky.) 17; Railway Co. v. Whitley, 54 Ark. 199; Sweet v. Lumber Co., 56 Ark. 629]

The construction and application of this clause of the statute of frauds first came before this court at December term, 1866, in Packet Co. v. Sickles (5 Wall. 580), which arose in this District of Columbia under the statute of 29 Car. II. c. 3, § 4, in force in the state of Maryland and in the District of Columbia. Alex. Br. St. Md. 509; Ellicott v. Peterson, 13 Md. 476, 487; Comp. St. D. C. c. 23, § 7.

That was an action upon an oral contract, by which a steamboat company agreed to attach a patented contrivance, known as the "Sickles Cut-off," to one of its steamboats, and, if it should effect a saving in the consumption of fuel, to use it on that boat during the continuance of the patent, if the boat should last so long; and to pay the plaintiffs weekly, for the use of the cut-off, three-fourths of the value of the fuel saved, to be ascertained in a specified manner. At the date of the contract the patent had twelve years to run. The court, in an opinion delivered by Mr. Justice Nelson, held the contract to be within the statute, and said: "The substance of the contract is that the defendants are to pay in money a certain proportion of the ascertained value of the fuel saved at stated intervals throughout the period of twelve years, if the boat to which the cut-off is attached should last so long." "It is a contract not to be performed within the year, subject to a defeasance by the happening of a certain event, which might or might not occur within that time." (5 Wall. 594–596.) And reference was made to Birch v. Liverpool (9 Barn. & C. 392) and Dobson v. Collis (1 Hurl. & N. 81), in each of which the agreement was for the hire of a thing, or of a person, for a term specified of more than a year, determinable by notice within the year, and therefore within the statute, because it was not to be performed within a year, although it was defeasible within that period.

In Packet Co. v. Sickles it appears to have been assumed, almost

without discussion, that the contract, according to its true construction, was not to be performed in less than twelve years, but defeasible by an event which might or might not happen within that time. It may well be doubted whether that view can be reconciled with the terms of the contract itself, or with the general current of the authorities. The contract, as stated in the forepart of the opinion, was to use and pay for the cut-off upon the boat "during the continuance of the said patent, if the said boat should last so long." (5 Wall. 581, 594.) The terms "during the continuance of" and "last so long" would seem to be precisely equivalent, and the full performance of the contract to be limited alike by the life of the patent and by the life of the boat. It is difficult to understand how the duration of the patent and the duration of the boat differed from one another in their relation to the performance or the determination of the contract; or how a contract to use an aid to navigation upon a boat so long as she shall last can be distinguished in principle from a contract to support a man so long as he shall live, which has been often decided, and is generally admitted, not to be within the statute of frauds.

At October term, 1877, this court, speaking by Mr. Justice Miller, said: "The statute of frauds applies only to contracts which, by their terms, are not to be performed within a year, and does not apply because they may not be performed within that time. In other words, to make a parol contract void, it must be apparent that it was the understanding of the parties that it was not to be performed within a year from the time it was made." And it was therefore held, in one case, that a contract by the owner of a valuable estate, employing lawyers to avoid a lease therof, and to recover the property, and promising to pay them a certain sum out of the proceeds of the land when recovered and sold, was not within the statute, because all this might have been done within a year; and, in another case, that a contract, made early in November, 1869, to furnish all the stone required to build and complete a lock and dam which the contractor with the State had agreed to complete by September 1, 1871, was not within the statute, because the contractor, by pushing the work, might have fully completed it before November, 1870. McPherson v. Cox, 96 U. S. 404, 416, 417; Walker v. Johnson, Id. 424, 427.

In Texas, where the contract now in question was made, and this action upon it was tried, the decisions of the Supreme Court of the State are in accord with the current of decisions elsewhere.

[The court then discusses Thouvenin v. Lea, 26 Tex. 612; Thomas v. Hammond, 47 Tex. 42; Weatherford, &c. Railway Co. v. Wood, 88 Tex. 191.]

In the case at bar, the contract between the railroad company and the plaintiff, as testified to by the plaintiff himself, who was the only

witness upon the point, was that, if he would furnish the ties and grade the ground for the switch at the place where he proposed to erect a sawmill, the railroad company would "put down the iron rails and maintain the switch for the plaintiff's benefit for shipping purposes as long as he needed it."

The parties may well have expected that the contract would continue in force for more than one year. It may have been very improbable that it would not do so; and it did in fact continue in force for a much longer time. But they made no stipulation which, in terms, or by reasonable inference, required that result. The question is not what the probable, or expected, or actual performance of the contract was, but whether the contract, according to the reasonable interpretation of its terms, required that it should not be performed within the year. No definite term of time for the performance of the contract appears to have been mentioned or contemplated by the parties, nor was there any agreement as to the amount of lumber to be sawed or shipped by the plaintiff, or as to the time during which he should keep up his mill.

The contract of the railroad company was with, and for the benefit of, the plaintiff personally. The plaintiff's own testimony shows (although that is not essential) that he understood that the performance of the contract would end with his own life. The obligation of the railroad company to maintain the switch was in terms limited and restricted by the qualification "for the plaintiff's benefit for shipping purposes as long as he needed it," and no contingency which should put an end to the performance of the contract, other than his not needing the switch for the purpose of his business, appears to have been in the mouth or in the mind of either party. If within a year after the making of the contract, the plaintiff had died, or had abandoned his whole business at this place, or for any other reason had ceased to need the switch for the shipping of lumber, the railroad company would have been no longer under any obligation to maintain the switch, and the contract would have been brought to an end by having been fully performed.

The complete performance of the contract depending upon a contingency which might happen within the year, the contract is not within the statute of frauds as an "agreement which is not to be performed within the space of one year from the making thereof."

Nor is it within the other clause of the statute of frauds, relied on in the answer, which requires certain conveyances of real estate to be in writing. The suggestion made in the argument for the defendant in error, that the contract was, in substance, a grant of an easement in real estate, and as such within the statute, overlooks the difference between the English and the Texan statutes in this particular. The existing statutes of Texas, while they substantially follow

the English statute of frauds, so far as to require a conveyance of any "estate of inheritance or freehold, or for a term of more than one year, in lands and tenements," as well as "any contract for the sale of real estate, or the lease thereof for a longer term than one year," to be in writing, omit to re-enact the additional words of the English statute, in the clause concerning conveyances, "or any uncertain interest of, in, to, or out of" lands or tenements, and, in the other clause, "or any interest in or concerning them." St. 29 Car. II. c. 3, §§ 1, 4; Rev. St. Tex. 1879, arts. 548, 2464; Pasch. Dig. arts. 997, 3875; James v. Fulcrod, 5 Tex. 512, 516; Stuart v. Baker, 17 Tex. 417, 420; Anderson v. Powers, 59 Tex. 213.

Judgment reversed, and case remanded to the Circuit Court, with directions to set aside the verdict, and to order a new trial.[1]

20 Cyc. 203 (19); 15 L. R. A. (N. S.) 313; W. P. 176–177 (17–18); 24 H. L. R. 160; 10 Mich. L. R. 561.

DOYLE *v.* DIXON.

97 MASSACHUSETTS, 208.—1867.

Contract for breach of an agreement by the defendant not to go into the grocery business in Chicopee for five years. Defendant did enter into the grocery business in Chicopee, and continued in it to the

[1] A contract originally within the one year clause of the Statute is not removed from the operation of the Statute where the parties, in order to prevent a misunderstanding, merely restate the terms orally subsequently and performance may be within a year from such restatement; but it would be otherwise if the contract were to be expressly renewed at such later time.—Odell v. Webendorfer, 60 N. Y. App. Div. 460.

In Billington v. Cahill, 51 Hun (N. Y.), 132, the court said: "To hold that a contract made on the 31st day of March for service for one year, to commence on the first day of April, was not within the statute of frauds, would be to evade and not to execute that statute. The mandate of the statute is positive that an agreement that, by its terms, is not to be performed within one year from the making thereof shall be void, unless it is evidenced by some writing signed by the party to be charged therewith. It is not apparent to us how it can fairly be held that a contract for a full year's service can be performed within one year from the making thereof, when it was made on a day previous to the commencement of the year. If this statute can be thus extended for one day, why may it not be extended indefinitely? The agreement in this case was within the letter and intent of the statute, even if made when claimed by the respondent. The weight of the authorities is to that effect." But in Smith v. Gold Coast Explorers, [1903] 1 K. B. 285, the court said: "If the contract in this case was for a year's service commencing on December 7, 1901—that is, on the day next after that on which the contract was made—and terminating on December 6, 1902, there is authority for holding that such a contract is not within the statute."

The clause relating to contracts not to be performed within one year applies to contracts to sell goods. Prested Miners Co. v. Gardner, [1911] 1 K. B. 425.

time of the commencement of this action. The defendant requested the judge to rule that the plaintiff could not recover upon an oral agreement not to go into the grocery business in Chicopee within five years, because such agreement was not to be performed within one year from the making thereof and was within the statute of frauds; but the judge ruled the contrary. The defendant alleged exceptions.

GRAY, J. It is well settled that an oral agreement which according to the expression and contemplation of the parties may or may not be fully performed within a year is not within that clause of the statute of frauds which requires any "agreement not to be performed within one year from the making thereof" to be in writing in order to maintain an action. An agreement therefore which will be completely performed according to its terms and intention if either party should die within the year is not within the statute. Thus in Peters v. Westborough, 19 Pick. 364, it was held that an agreement to support a child until a certain age at which the child would not arrive for several years was not within the statute, because it depended upon the contingency of the child's life, and, if the child should die within one year, would be fully performed. On the other hand, if the agreement cannot be completely performed within a year, the fact that it may be terminated or further performance excused or rendered impossible, by the death of the promisee or of another person within a year, is not sufficient to take it out of the statute. It was therefore held in Hill v. Hooper, 1 Gray, 131, that an agreement to employ a boy for five years and pay his father certain sums at stated periods during that time was within the statute; for although by the death of the boy the services which were the consideration of the promise would cease, and the promise therefore be determined, it would certainly not be completely performed. So if the death of the promisor within the year would merely prevent full performance of the agreement, it is within the statute; but if his death would leave the agreement completely performed and its purpose fully carried out, it is not. It has accordingly been repeatedly held by this court that an agreement not hereafter to carry on a certain business at a particular place was not within the statute, because, being only a personal engagement to forbear doing certain acts, not stipulating for anything beyond the promisor's life, and imposing no duties upon his legal representatives, it would be fully performed if he died within the year. Lyon v. King, 11 Met. 411; Worthy v. Jones, 11 Gray, 168. An agreement not to engage in a certain kind of business at a particular place for a specified number of years is within the same principle; for whether a man agrees not to do a thing for his life, or never to do it, or only not to do it for a certain number of years, it is in either form an agreement by which he does not promise that anything shall be done after his death, and the performance of which is there-

fore completed with his life. An agreement to do a thing for a certain time may perhaps bind the promisor's representatives, and at any rate is not performed if he dies within that time. But a mere agreement that he will himself refrain from doing a certain thing is fully performed if he keeps it so long as he is capable of doing or refraining. The agreement of the defendant not to go into business again at Chicopee for five years was therefore not within the statute of frauds. . . .

Exceptions overruled.[1]

20 Cyc. 204–205 (30–33); W. P. 177 (10).

GREAT WESTERN TURNPIKE CO. *v.* SHAFER.[2]

57 N. Y. APPELLATE DIVISION, 331.—1901.

KELLOGG, J. This action was brought to collect tolls for passage through the plaintiff's tollgate, situated at the easterly end of its present turnpike, and near the Albany city limits. The defendant admits to have passed in 1895 with teams hauling ice from the so-called Buell farm, occupied by him, and that he paid no tolls. The Buell farm is near the tollgate, the dwelling house thereon being within 100 feet of the gate, and the gate stands between it and the city. The ice was gathered from a pond on this farm, and was stored in a house thereon, and within 400 feet of the gate. The defendant claims that in 1853 an oral agreement was made between William P. Buell, owner of a life interest in the farm, and the plaintiff, whereby Buell was to close up a private road which gave convenient access to him and others to the city of Albany without passing along the toll road, and as a consideration he and the tenants of the Buell farm should for all time be exempt from the burden of toll; that he closed the road, and has always since kept it closed, and has, up to a short time before the bringing this action in 1895—40 years and more—passed the tollgate without payment of any toll, and up to that date the plaintiff has strictly observed the terms of its agreement, and thereby ratified and confirmed it, and should now be held to it. . . .

It appears from the evidence that some one in the employ of plaintiff, in about 1853, professing to be authorized so to do, did agree with Buell, the occupant of the Buell farm, and having therein a life interest, that, if he would close up a road which diminished the travel over plaintiff's turnpike, the Buell farm and its occupants should be forever relieved of tolls at the gate near the Buell farm. It also ap-

[1] Contra, McGirr v. Campbell, 71 N. Y. Appellate Division, 83; Reeve v. Jennings, [1910] 2 K. B. 522.

[2] Affirmed, 172 N. Y. 662.

pears that Buell, acting upon that promise, did close the road, and it never was thereafter used. It also appears that at no time since—over 40 years—has the plaintiff demanded tolls at this gate of Buell, or from any tenant or occupant of the Buell farm. It is well-recognized law that if a person assumes to act as the agent of a corporation, and the corporation afterwards adopts his acts, that is sufficient proof of authority. It is wholly inconsistent that after 40 years' recognition of this agreement the plaintiff should now raise any question as to the authority of the person making the agreement.

We may safely conclude that the agreement was made and was well supported by ample consideration, and by its terms the defendant had the right to haul the ice in 1895 free of tolls. The only remaining question is as to the legal force of the agreement. In other words, was it valid at law? Except for the statute of frauds, I think there would be no room for argument. It is an oral agreement—Is it an agreement not to be performed within one year? Is it a grant of an interest in lands,—an easement? The pleadings seem to have also been oral. Whether the statute of frauds was pleaded so as to be available to plaintiff does not appear. The subject-matter does not seem to me to be of the nature of an easement or any interest in land. Buell was not negotiating for any right of way. The right to pass and repass was already secured to him by the law. A burden was attached to that right, not in itself in any way a limitation on the right, nor was the burden in the nature of realty. The franchise of the plaintiff empowered it to exact money; to fix a tax upon the enjoyment of the right of way,—the right to impose an obstruction to the freedom of the use which the law conferred. I cannot understand that this was in its nature such an interest as the statute of frauds contemplates when it requires that dealings in respect to it must, to be valid, be evidenced by a writing. If one were to pay a return toll, could he not return without payment of another toll unless he had the agreement to return free of toll in writing? What Buell actually did was to pay his toll for all time in advance. He extinguished a burden thereby, and plaintiff had no right afterwards to impose it. The tolls had been paid. That is the sole reason that tolls were not collectible. The amount paid, it was agreed, should be, and was, sufficient to cover all future tolls which otherwise might have been exacted from Buell and the occupants of his farm. I do not think plaintiff can repudiate the agreement now because there is no writing to prove it. As to the other claim, that it was an agreement not to be performed within a year, and therefore void, there seems to me to be very little to sustain it, and what argument there may be is specious. It was not an agreement to *do* anything. If plaintiff had agreed to carry Buell for a number of years, or had agreed to do any continuous labor for years, or to maintain its

turnpike for years, a ground for argument would be apparent. No time here is fixed. The plaintiff might abolish its gate within a year, but time was not involved. The agreement at once and forever eliminated a burden. It made an end of it then. There was no future for it,—no year or succession of years. The plaintiff sold its power to vex the occupants of the farm, and that was all there was of it.

I do not find that there are any exceptions taken on the trial which require a reversal, nor was there serious error committed in the admission or exclusion of testimony. I think the judgment should be affirmed, with costs. All concur, except Parker, P. J., and Smith, J., dissenting.

15 H. L. R. 154.

DURFEE *v.* O'BRIEN.

16 RHODE ISLAND, 213.—1888.

Defendant's petition for a new trial.

STINESS, J. The record in this case shows that Philip H. Durfee, the plaintiff's intestate, built a house for the defendant in 1874. An agreement, signed by said Durfee but not signed by the defendant, was put in evidence, from which it appeared that the price was to be $2,400; of which sum $500 was to be paid when the house was begun, $500 when it was finished, and the balance in five yearly payments, with interest, payable semi-annually. Payments having been made from time to time, as shown by receipts and an account entered by said Durfee in a book in the possession of the defendant, the cost of the house being entered as $2,416.67, the plaintiff sues for the balance due on the contract, with interest. The defendant asked the court to charge the jury: "That, as the contract sued upon was not to be performed by both parties within one year from the making thereof, and was not signed by the defendant or by some one authorized by her to sign it, that all the provisions of the contract are void, and the plaintiff can recover only upon the *quantum meruit* counts the reasonable value of the services rendered and materials furnished." The presiding justice refused this request, and charged the jury: "That, if the house was built under the contract, if one has been proved, and accepted by the defendant, the plaintiff can recover the contract price; that, if there was a contract for the building of the house for a stipulated price, and the house was built according to contract, and all the stipulations on the part of Durfee were performed within one year, according to the intent of the contract, the mere fact that payment for the house was not, according to the agreement, to be completed within one year, would not relieve the defendant from liability to pay the agreed price, even if the agreement was not signed

by the defendant or her agent." The defendant sought to show that it was not worth $2,400 to build the house.

We must assume that the jury found there was a contract to pay $2,400; and the question to be determined, therefore, is, whether the instruction was correct; that the statute of frauds does not extend to actions for payment upon contracts which are wholly executed on one side within a year.

In England this doctrine was first decisively laid down in Donnellan v. Read, 3 B. & Ad. 899, in 1832. In Souch v. Strawbridge, 2 C. B. 808, it was approved by Tindal, C. J., but the decision of the case did not turn on that point. In Cherry v. Heming, 4 Exch. Rep. 631, it was again sustained; again in Smith v. Neale, 2 C. B. N. S. 67; and in the recent case of Miles v. New Zealand Alford Estate Co. 54 L. J. Rep. Eq. 1035, North, J., p. 1040, citing Donellan v. Read and Cherry v. Heming, says: "I think there is a great deal of force in the observation that what is required by the statute is, that the agreement should be performed and not that it should be partly performed, and that performance means performance by both parties. But that has been settled; and it has been decided that all that is required is performance by one party within the year, however many years may have to elapse before the agreement is performed by the other party." In this country, however, there has been considerable conflict of opinion. In Alabama, Georgia, Maine, South Carolina, Maryland, Illinois, Ohio, Indiana, Arkansas, Missouri, and Wisconsin, the English rule has been followed. See Rake v. Pope, 7 Ala. 161; Johnson v. Watson, 1 Ga. 348; Holbrook v. Armstrong, 10 Me. 31; Compton v. Martin, 5 Rich. 14; Ellicott v. Turner, 4 Md. 476; Curtis v. Sage, 35 Ill. 22; Randall v. Turner, 17 Ohio St. 262; Haigh and others v. Blythe's Executors, 20 Ind. 24; Pledger v. Garrison, 42 Ark. 246; Suggett's Adm'r v. Cason's Adm'r, 26 Mo. 221; McClellan v. Sanford, 26 Wisc. 595. In New Hampshire the decisions are conflicting; the earliest and latest sustaining the English rule. See Blanding v. Sargent, 33 N. H. 239; Emery v. Smith, 46 N. H. 151; Perkins v. Clay, 54 N. H. 518. The contrary doctrine has been held in Vermont, Massachusetts, and New York. See Pierce v. Estate of Paine, 28 Vt. 34; Marcy v. Marcy, 9 Allen, 8; Lockwood v. Barnes, 3 Hill, N. Y. 128; Broadwell v. Getman, 2 Denio, 87; Kellogg v. Clark, 23 Hun, 393.

In the former class of cases it is held that the statute does not extend to contracts which are wholly executed on one side, or which may be executed by one side within a year, but only to contracts which, as a whole, are not to be executed within a year. These cases construe the words, "not to be performed," to mean not to be performed on either side within a year. The other class of cases hold that performance by one party is not performance of the agreement, and that,

in any view, the part of the contract sued upon comes within the statute, for which the part performed is only the consideration. As to the question which is involved in this case, viz., the payment for property delivered and accepted under a promise to pay, we think the weight of authority is in favor of the English rule. Mr. Browne, in his work on the Statute of Frauds, suggests a reason for the apparent contrariety of the rule and the statute. He says, 4th ed., § 290: "It may well be doubted, indeed, whether this doctrine would ever have been accepted in England, if the question had not uniformly arisen on cases where the stipulation sought to be enforced related solely to the payment of the money consideration. In such cases it is a mere matter of form in bringing the action, the plaintiff's right to recover on the *indebitatus assumpsit,* which count is uniformly found to have been inserted in the declaration, being clear." In Pierce v. Estate of Paine, 28 Vt. 34, Redfield, C. J., says: "If the contract has been performed on one side in such a manner that the performance goes to the benefit of the other party, whether this was done within the year or not, it undoubtedly lays the foundation of a recovery against the party benefited by such performance. But when the contract on the part of this party was not to be performed within one year from the time it was made, the recovery is not upon the contract but upon the *quantum meruit* or *valebat,* or upon money counts. It is a recovery back of the consideration of a contract upon which no action will lie, and which has been repudiated by the other party." While this statement is logical, and, aside from the consideration of authority, might be satisfactory, it is evident that the real difference between this case and those opposed to it is the form of pleading. If the recovery be upon a *quantum meruit* count, still the contract is admissible as evidence to show what the defendant admitted and declared the consideration to be worth, and to show the nature and extent of the benefit conferred. 1 Smith's Lead. Cas. 7th Amer. ed. 588. Now under the English rule that amount is fixed and determined by the contract, and under a *quantum meruit* it may also be the same amount; but in the latter case it is possible that one may use the statute as a means of depriving another of the stipulated price for which he let his property go; or, on the other hand, he may be compelled to pay for it more than he agreed to give. The inequity of either result is a strong reason against the adoption of a rule which might lead to it. Another reason given in support of the English rule in these cases is, that inasmuch as the contract is not executory except as to the matter of payment, or recovery back of the consideration, as to which a clear right of action exists, such cases are not within the mischief which the statute is designed to prevent, and therefore not to be construed as within the operation of the statute. While such a proposition is by no means unanswerable, there is,

nevertheless, a wide distinction between a case where one seeks to enforce a verbal contract more than a year after it was made, when witnesses to its terms may have died, or from lapse of time have lost their clear recollection of executory stipulations, and a case where one simply seeks to recover payment for a benefit received. In the latter case the question comes down to a recovery upon a count on the contract, or upon *quantum meruit* with the contract admissible as evidence. Since recovery on the contract may, as we have seen, be sustained upon reason, and is supported by the weight of authority, we think it is the better rule to follow. We decide therefore, that there was no error in the instruction given to the jury.

It is also claimed by the defendant that there is no liability to pay interest except from the date of a demand for payment. The contract, as claimed by the plaintiff and found by the jury, was to pay the balance due in five yearly payments, with interest at eight per cent semi-annually. The plaintiff claims interest only at the rate of six per cent. The time when the payments are due and the agreement to pay interest being definite, the charge for interest was properly allowed. It is said in Spencer v. Pierce, 5 R. I. 63, that the well settled American rule gives interest "as an invariable legal incident of the principal debt, from the day of default, whenever the debtor knows precisely *what* he is to pay and *when* he is to pay it."

Petition dismissed.

20 Cyc. 291 (88); 292 (91); W. P. 177 (18); 789 (29).

(*iii.*) *Provisions of seventeenth section.*

NORTHERN *et al. v.* THE STATE on the Relation of LATHROP.

1 INDIANA, 113.—1848.

PERKINS, J. . . . The finding of the court upon the issue on the replication to the third plea was wrong. The defendants had no property subject to execution. It is admitted they had not, unless the corn mentioned below was so. A witness, "James H. Goff, testified that, about the last of May or first of June, 1844, after the corn which David Griffin had planted on the farm of George Cheek was two or three inches high, said Griffin called and told him the weeds were about taking his corn; that he was poor and sick, and should not be able to raise his crop unless," etc. Goff then bought the corn of Griffin, paid a part of the consideration in hand, etc. The execution against Griffin, for failing to make the money on which the defendants are sued, did not issue till the August succeeding this sale, and it is not pretended there was any fraud; but it is insisted that the corn

was not so *in esse* at the time as to be the subject of sale, and that the contract was for an interest in land and within the statute requiring a memorandum in writing. The cases of Whipple v. Foot (2 John. 418), Austin v. Sawyer (9 Cow. 39), Craddock v. Riddlesbarger (2 Dana, 205), and Jones v. Flint (10 Ad. & Ell. 753), among others, decide that growing crops, raised annually, by labor, are the subject of sale as personal property, before maturity, and that their sale does not necessarily involve an interest in the realty requiring a written agreement. See also Chit. on Con. 301; 1 Hill Ab. 58. We think this case comes within those cited. No other point requires an opinion.

It is only necessary to add, that we are not satisfied, upon a full examination of this case, that the plaintiff in error was not injured by the erroneous decision of the court below, and shall, therefore, reverse the final judgment there rendered.

Per Curiam. The judgment is reversed with costs. Cause remanded, etc.

20 Cyc. 244 (88); W. P. 173 (14).

HIRTH *v.* GRAHAM.

50 OHIO STATE, 57.—1893.

The plaintiff in error brought an action before a justice of the peace to recover of the defendant in error damages alleged to have been sustained on account of the refusal of the latter to perform a contract by which he had sold to the plaintiff in error certain growing timber. Plaintiff had judgment before the justice of the peace which was affirmed by the Court of Common Pleas, but reversed by the Circuit Court. Error to Circuit Court.

BRADBURY, J. . . . Whether a sale of growing trees is the sale of an interest in or concerning land has long been a much controverted subject in the courts of England, as well as in the courts of the several States of the Union. The question has been differently decided in different jurisdictions, and by different courts, or at different times by the same court within the same jurisdiction. The courts of England, particularly, have varied widely in their holdings on the subject. Lord Mansfield held that the sale of a crop of growing turnips was within this clause of the statute. Emmerson v. Heelis, 2 Taunt. 38, following the case of Waddington v. Bristow, 2 Bos. & P. 452, where the sale of a crop of growing hops was adjudged not to have been a sale of goods and chattels merely. And in Crosby v. Wadsworth (6 East. 602) the sale of growing grass was held to be a contract for the sale of an interest in or concerning land, Lord Ellenborough saying,

"Upon the first of these questions" (whether this purchase of the growing crop be a contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them) "I think that the agreement stated, conferring, as it professes to do, an exclusive right to the vesture of the land during a limited time and for given purposes, is a contract or sale of an interest in, or at least an interest concerning, lands." Id. 610. Afterwards, in Teal v. Auty (2 Brod. & B. 99), the Court of Common Pleas held a contract for the sale of growing poles was a sale of an interest in or concerning lands. Many decisions have been announced by the English courts since the cases above noted were decided, the tendency of which have been to greatly narrow the application of the fourth section of the statute of frauds to crops, or timber, growing upon land. Crops planted and raised annually by the hand of man are practically withdrawn from its operation, while the sale of other crops, and in some instances growing timber also, are withdrawn from the statute, where, in the contemplation of the contracting parties, the subject of the contract is to be treated as a chattel. The latest declaration of the English courts upon this question is that of the common pleas division of the high court of justice in Marshall v. Green (1 C. P. Div. 35), decided in 1875. The syllabus reads: "A sale of growing timber to be taken away as soon as possible by the purchaser is not a contract or sale of land, or any interest therein, within the fourth section of the statute of frauds." This decision was rendered by the three justices who constituted the common pleas division of the high court of justice, Coleridge, C. J., Brett and Grove, JJ., whose characters and attainments entitle it to great weight; yet, in view of the prior long period of unsettled professional and judicial opinion in England upon the question, that the court was not one of final resort, and that the decision has encountered adverse criticism from high authority (Benj. Sales [ed. 1892], § 126), it cannot be considered as finally settling the law of England on this subject. The conflict among the American cases on the subject cannot be wholly reconciled. In Massachusetts, Maine, Maryland, Kentucky, and Connecticut, sales of growing trees to be presently cut and removed by the vendee, are held not to be within the operation of the fourth section of the statute of frauds. Claflin v. Carpenter, 4 Metc. (Mass.) 580; Nettleton v. Sikes, 8 Metc. (Mass.) 34; Bostwick v. Leach, 3 Day, 476; Erskine v. Plummer, 7 Me. 447; Cutler v. Pope, 13 Me. 377; Cain v. McGuire, 13 B. Mon. 340; Byassee v. Reese, 4 Metc. (Ky.) 372; Smith v. Bryan, 5 Md. 141. In none of these cases, except 4 Metc. (Ky.) 372, and in 13 B. Mon. 340, had the vendor attempted to repudiate the contract before the vendee had entered upon its execution, and the statement of facts in those two cases do not speak clearly upon this point. In the leading English case before cited (Marshall v. Green, 1 C. P.

Div. 35) the vendee had also entered upon the work of felling the trees, and had sold some of their tops before the vendor countermanded the sale. These cases, therefore, cannot be regarded as directly holding that a vendee, by parol, of growing timber to be presently felled and removed, may not repudiate the contract before anything is done under it; and this was the situation in which the parties to the case now under consideration stood when the contract was repudiated. Indeed, a late case in Massachusetts (Giles v. Simonds, 15 Gray, 441) holds that "the owner of land, who has made a verbal contract for the sale of standing wood to be cut and severed from the freehold by the purchaser, may at any time revoke the license which he thereby gives to the purchaser to enter his land to cut and carry away the wood, so far as it relates to any wood not cut at the time of the revocation." The courts of most of the American States, however, that have considered the question, hold expressly that a sale of growing or standing timber is a contract concerning an interest in lands, and within the fourth section of the statute of frauds. Green v. Armstrong, 1 Denio, 550; Bishop v. Bishop, 11 N. Y. 123; Westbrook v. Eager, 16 N. J. Law, 81; Buck v. Pickwell, 27 Vt. 157; Cool v. Lumber Co., 87 Ind. 531; Terrell v. Frazier, 79 Ind. 473; Owens v. Lewis, 46 Ind. 488; Armstrong v. Lawson, 73 Ind. 498; Jackson v. Evans, 44 Mich. 510, 7 N. W. Rep. 79; Lyle v. Shinnebarger, 17 Mo. App. 66; Howe v. Batchelder, 49 N. H. 204; Putney v. Day, 6 N. H. 430; Bowers v. Bowers, 95 Pa. St. 477; Daniels v. Bailey, 43 Wis. 566; Lillie v. Dunbar, 62 Wis. 198, 22 N. W. Rep. 467; Knox v. Haralson, 2 Tenn. Ch. 232. The question is now, for the first time, before this court for determination; and we are at liberty to adopt that rule on the subject most conformable to sound reason. In all its other relations to the affairs of men, growing timber is regarded as an integral part of the land upon which it stands; it is not subject to levy and sale upon execution as chattel property; it descends with the land to the heir, and passes to the vendor with the soil. Jones v. Timmons, 21 Ohio St. 596. Coal, petroleum, building stone, and many other substances constituting integral parts of the land, have become articles of commerce, and easily detached and removed, and, when detached and removed, become personal property, as well as fallen timber; but no case is found in which it is suggested that sales of such substances, with a view to their immediate removal, would not be within the statute. Sales of growing timber are as likely to become the subjects of fraud and perjury as are the other integral parts of the land, and the question whether such sale is a sale of an interest in or concerning lands should depend not upon the intention of the parties, but upon the legal character of the subject of the contract, which, in the case of growing timber, is that of realty. This rule has the additional merit of being clear,

simple, and of easy application,—qualities entitled to substantial weight in choosing between conflicting principles. Whether circumstances of part performance might require a modification of this rule is not before the court, and has not been considered. Judgment affirmed.[1]

20 Cyc. 245 (89); 228-229 (84-87); 19 L. R. A. 721; W. P. 173 (14); 783 (19).

GODDARD *v.* BINNEY.

115 MASSACHUSETTS, 450.—1874.

Contract to recover the price of a buggy built by plaintiff for defendant. Defense, the statute of frauds.

Defendant ordered plaintiff, a carriage manufacturer, to build him a buggy, with a drab lining, outside seat of cane, painted in a specified style, and with defendant's monogram on the sides. Defendant called on plaintiff afterward, and on being asked if he would consent that plaintiff should sell the buggy, replied no, that he would keep it. After it was finished according to directions, plaintiff sent a bill to defendant, and sent twice afterward for payment, and each time defendant promised to call and see plaintiff about it. Before the buggy was paid for or delivered, it was burned.

Verdict was directed for defendant, and it was agreed that if the court is of opinion that the buggy was on the premises of plaintiff at risk of defendant, the verdict should be set aside and judgment entered for plaintiff for $675 and interest; otherwise judgment on the verdict.

AMES, J. Whether an agreement like that described in this report should be considered as a contract for the sale of goods, within the meaning of the statute of frauds, or a contract for labor, services, and materials, and therefore not within that statute, is a question upon which there is a conflict of authority. According to a long course of decisions in New York, and in some other States of the Union, an agreement for the sale of any commodity not in existence at the time, but which the vendor is to manufacture or put in a condition to be delivered (such as flour from wheat not yet ground, or nails to

[1] In Long v. White, 42 Oh. St. 59, the court held: "In applying the Statute of Frauds, buildings are not classed with forest trees, but with growing crops, nursery trees, and fixtures attached to realty. And buildings are realty or personalty, according to the intention of the parties. And when the parties in interest agree that they may be severed and moved from the realty, buildings are held and treated as personalty. Bostwick v. Leach, 3 Day, 476; Hollen v. Runder, Cromp. M. & R. 266; Curtis v. Hoyt, 19 Conn. 154; Shaw v. Carbrey, 13 Allen, 462; Hartwell v. Kelly, 117 Mass. 235, 237; Keyser v. District No. 8, 35 N. H. 477; Fortman v. Goepper, 14 Ohio St. 558; Wagner v. C. and T. R. Co., 22 Ohio St. 563, 576."

be made from iron in the vendor's hands), is not a contract of sale within the meaning of the statute. Crookshank v. Burrell, 18 Johns. 58; Sewall v. Fitch, 8 Cow. 215; Robertson v. Vaughn, 5 Sandf. 1; Downs v. Ross, 23 Wend. 270; Eichelberger v. M'Cauley, 5 Har. & J. 213. In England, on the other hand, the tendency of the recent decisions is to treat all contracts of such a kind intended to result in a sale, as substantially contracts for the sale of chattels; and the decision in Lee v. Griffin (1 B. & S. 272) goes so far as to hold that a contract to make and fit a set of artificial teeth for a patient is essentially a contract for the sale of goods, and therefore is subject to the provisions of the statute. See Maberley v. Sheppard, 10 Bing. 99; Howe v. Palmer, 3 B. & Ald. 321; Baldey v. Parker, 2 B. & C. 37; Atkinson v. Bell, 8 B. & C. 277.

In this commonwealth, a rule avoiding both of these extremes was established in Mixer v. Howarth (21 Pick. 205), and has been recognized and affirmed in repeated decisions of more recent date. The effect of these decisions we understand to be this, namely, that a contract for the sale of articles then existing or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute. Spencer v. Cone, 1 Met. 283. "The distinction," says Chief Justice Shaw, in Lamb v. Crafts (12 Met. 353), "we believe is now well understood. When a person stipulates for the future sale of articles, which he is habitually making, and which, at the time, are not made or finished, it is essentially a contract of sale, and not a contract for labor; otherwise, when the article is made pursuant to the agreement." In Gardner v. Joy (9 Met. 177) a contract to buy a certain number of boxes of candles at a fixed rate per pound, which the vendor said he would manufacture and deliver in about three months, was held to be a contract of sale and within the statute. To the same general effect are Waterman v. Meigs, 4 Cush. 497, and Clark v. Nichols, 107 Mass. 547. It is true that in "the infinitely various shades of different contracts," there is some practical difficulty in disposing of the questions that arise under that section of the statute. Gen. Sts. c. 105, § 5. But we see no ground for holding that there is any uncertainty in the rule itself. On the contrary, its correctness and justice are clearly implied or expressly affirmed in all of our decisions upon the subject-matter. It is proper to say also that the present case is a much stronger one than Mixer v. Howarth. In this case, the carriage was not only built for the defendant, but in conformity in some respects with his directions, and at his request was marked with his initials.

It was neither intended nor adapted for the general market. As we are by no means prepared to overrule the decision in that case, we must therefore hold that the statute of frauds does not apply to the contract which the plaintiff is seeking to enforce in this action.

Independently of that statute, and in cases to which it does not apply, it is well settled that as between the immediate parties, property in personal chattels may pass by bargain and sale without actual delivery. If the parties have agreed upon the specific thing that is sold and the price that the buyer is to pay for it, and nothing remains to be done but that the buyer should pay the price and take the same thing, the property passes to the buyer, and with it the risk of loss by fire or any other accident. The appropriation of the chattel to the buyer is equivalent, for that purpose, to delivery by the seller. The assent of the buyer to take the specific chattel is equivalent for the same purpose to his acceptance of possession. Dixon v. Yates, 5 B. & Ad. 313, 340. The property may well be in the buyer, though the right of possession, or lien for the price, is in the seller. There could in fact be no such lien without a change of ownership. No man can be said to have a lien, in the proper sense of the term, upon his own property, and the seller's lien can only be upon the buyer's property. It has often been decided that assumpsit for the price of goods bargained and sold can be maintained where the goods have been selected by the buyer, and set apart for him by the seller, though not actually delivered to him, and where nothing remains to be done except that the buyer should pay the agreed price. In such a state of things the property vests in him, and with it the risk of any accident that may happen to the goods in the meantime. Noy's Maxims, 89; 2 Kent. Com. (12th ed.) 492; Bloxam v. Sanders, 4 B. & C. 941; Tarling v. Baxter, 6 B. & C. 360; Hinde v. Whitehouse, 7 East, 571; Macomber v. Parker, 13 Pick. 175, 183; Morse v. Sherman, 106 Mass. 430.

In the present case, nothing remained to be done on the part of the plaintiff. The price had been agreed upon; the specific chattel had been finished according to order, set apart and appropriated for the defendant, and marked with his initials. The plaintiff had not undertaken to deliver it elsewhere than on his own premises. He gave notice that it was finished, and presented his bill to the defendant, who promised to pay it soon. He had previously requested that the carriage should not be sold, a request which substantially is equivalent to asking the plaintiff to keep it for him when finished. Without contending that these circumstances amount to a delivery and acceptance within the statute of frauds, the plaintiff may well claim that enough has been done, in a case not within that statute, to vest the general ownership in the defendant, and to cast upon him

the risk of loss by fire, while the chattel remained in the plaintiff's possession.

According to the terms of the reservation, the verdict must be set aside, and judgment entered for the plaintiff.[1]

20 Cyc. 241 (70–79); 14 L. R. A. 230; 13 C. L. R. 525; Williston on Sales, pp. 60–63 (8–17).

[1] *English rule at common law.*—In Lee v. Griffin, 1 Best & Smith, 272, the action was brought to recover the sum of £21 for two sets of artificial teeth ordered by the deceased. Crompton, J., said: "The main question which arose at the trial was, whether the contract in the second count could be treated as one for work and labour, or whether it was a contract for goods sold and delivered. The distinction between these two causes of action is sometimes very fine; but, where the contract is for a chattel to be made and delivered, it clearly is a contract for the sale of goods. There are some cases in which the supply of the materials is ancillary to the contract, as in the case of a printer supplying the paper on which a book is printed. In such a case an action might perhaps be brought for work and labour done, and materials provided, as it could hardly be said that the subject-matter of the contract was the sale of a chattel: perhaps it is more in the nature of a contract merely to exercise skill and labour. Clay v. Yates, 1 H. & N. 73, turned on its own peculiar circumstances. I entertain some doubt as to the correctness of that decision; but I certainly do not agree to the proposition that the value of the skill and labour, as compared to that of the material supplied, is a criterion by which to decide whether the contract be for work and labour or for the sale of a chattel. Here, however, the subject-matter of the contract was the supply of goods. The case bears a strong resemblance to that of a tailor supplying a coat, the measurement of the mouth and fitting of the teeth being analogous to the measurement and fitting of the garment."

New York rule at common law.—In Cooke v. Millard, 65 N. Y. 352, the defendants, desiring to purchase lumber, went to plaintiff's yard, where they were shown lumber of the desired quality, but which, to meet their requirements, needed to be dressed and cut into different sizes. They gave a verbal order for certain quantities and sizes, amounting, at the prices specified, to $918.22, to be taken from the lots examined by defendants. The court held the contract to be a sale and within the statute of frauds. Dwight, C., in an exhaustive opinion said: "It is held here by a long course of decisions, that an agreement for the sale of any commodity not in existence at the time, but which the vendor is to manufacture or put in a condition to be delivered, such as flour from wheat not yet ground, or nails to be made from iron belonging to the manufacturer, is not a contract of sale. The New York rule lays stress on the word sale. There must be a sale at the time the contract is made. The latest and most authoritative expression of the rule is found in a recent case in this court. (Parsons v. Loucks, 48 N. Y. 17, 19.) The contrast between Parsons v. Loucks, in this state on the one hand, and Lee v. Griffin (*supra*), in England on the other is, that in the former case, the word sale refers to time of entering into the contract, while in the latter, reference is had to the time of delivery, as contemplated by the parties. If at that time it is a chattel it is enough, according to the English rule. Other cases in this State agreeing with Parsons v. Loucks, are Crookshank v. Burrel (18 J. R. 58); Sewall v. Fitch (8 Cow. 215); Robertson v. Vaughn (5 Sandf. S. C. 1); Parker v. Schenck (28 Barb. 38). These cases are based on certain old decisions in England, such as Towers v. Osborne (1 Strange,

GREENWOOD *v.* LAW.

55 NEW JERSEY LAW, 168.—1892.

VAN SYCKEL, J. Law, the plaintiff below, gave to Greenwood, the defendant, a mortgage upon lands in this State for the sum of $3700. Law alleged that Greenwood entered into a parol agreement with him to assign him this mortgage for the sum of $3000, and brought this suit to recover damages for the refusal of Greenwood to execute said parol agreement.

On the trial below, a motion was made to nonsuit the plaintiff, on the ground that the alleged agreement was within the statute of frauds. The refusal of the trial court to grant this motion is assigned for error.

Lord Chief Justice Denman, in Humble v. Mitchell, reported in 11 Ad. & E. 205, and decided in 1840, said that no case directly in

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506), and Clayton v. Andrews (4 Burrow, 2101), which have been wholly discarded in that country.

The case at bar does not fall within the rule of Parsons v. Loucks. The facts of that case were, that a manufacturer agreed to make for the other party to the contract two tons of book paper. The paper was not in existence, and so far as appears, not even the rags, 'except so far as such existence may be argued from the fact that matter is indestructible.' So in Sewall v. Fitch (*supra*), the nails which were the subject of the contract were not then wrought out, but were to be made and delivered at a future day.

Nothing of this kind is found in the present case. The lumber, with the possible exception of the clap-boards, was all in existence when the contract was made. It only needed to be prepared for the purchaser—dressed and put in a condition to fill his order. . . . I think the true rule to be applied in this state is, that when the chattel is in existence, so as not to be governed by Parsons v. Loucks (*supra*), the contract should be deemed one of sale, even though it may have been ordered from a seller who is to do some work upon it to adapt it to the uses of the purchaser. Such a rule makes a single distinction, and that is between existing and non-existing chattels. There will still be border cases where it will be difficult to draw the line, and to discover whether the chattels are in existence or not."

For citations of cases in jurisdictions following the English, Massachusetts and New York common law rules, respectively, see Williston, Sales, pp. 61–63, notes 10a–17.

Statutory rule.—By the Uniform Sales Act, now adopted in New York, Mass., Ohio and several other states, the test for determining whether the contract is one for a sale or one for work, labor, and materials is provided by § 4 sub-div. 2 (draftsman's numeration) as follows: "The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply."

point on this subject had been found, and he held that shares in an incorporated company were not goods, wares, and merchandise within the seventeenth section of the statute of frauds.

He overlooked the cases of Mussell v. Cooke, reported in Precedents in Chancery, 533 (decided in 1720), and Crull v. Dodson, reported in Select Cases in Chancery (*temp.* King), 41 (decided in 1725), in which the contrary view was taken.

In the case of Pickering v. Appleby (Com. 354) this question was fully argued before the twelve judges, who were equally divided upon it. The cases decided in the English courts since 1840 have followed Humble v. Mitchell. They will be found collected in Benjamin on Sales (ed. 1888) in a note on page 106.

In this country a different rule prevails in most of the States.

In Baldwin v. Williams (3 Metc. 365) a parol contract for the sale of a promissory note was held to be within the statute.

In Connecticut and Maine a contract for the sale of shares in a joint stock company is required to be in writing. North v. Forest, 15 Conn. 400; Pray v. Mitchell, 60 Me. 430.

Chief Justice Shaw, after a full discussion of the subject in Tisdale v. Harris (20 Pick. 9), concludes that a contract for the sale of shares in a manufacturing corporation is a contract for the sale of goods or merchandise within the statute of frauds, and in the absence of the other requisites of the statute must be proved by some note or memorandum in writing signed by the party to be charged or his agent. He did not regard the argument, that by necessary implication the statute applies only to goods of which part may be delivered, as worthy of much consideration. An animal is not susceptible of part delivery, yet undoubtedly the sale of a horse by parol is within the statute. The exception in the statute is, when part is delivered; but if there cannot be a delivery in part, the exception cannot exist to take the case out of the general prohibition.

Bonds and mortgages were expressly held to be goods and chattels in Terhune v. Executors of Bray, 1 Harr. 53. That was an action of trover for a bond and mortgage. Chief Justice Hornblower, in deciding the case, said that, although the attachment act and letters of administration seem to distinguish between rights and credits and goods and chattels, and although an execution against the latter will not reach bonds and notes, yet there is a sense in which upon sound legal principles such securities are goods and chattels.

This sense ought to be applied to these words in this case.

Reason and sound policy require that contracts in respect to securities for money should be subject to the reasonable restrictions provided by the statute to prevent frauds in the sale of other personal property.

The words "goods, wares, and merchandise" in the sixth section of

the statute are equivalent to the term "personal property," and are intended to include whatever is not embraced by the phrase "lands, tenements, and hereditaments" in the preceding section. In my judgment, the contract sued upon is within the statute of frauds, and it was error in the court below to refuse to nonsuit.

20 Cyc. 244 (83–87); 16 H. L. R. 602; Williston on Sales, pp. 70–72 (48–58).

Consideration.

(*i.*) *Consideration is necessary to the validity of every simple contract.*

COOK *v.* BRADLEY.

7 CONNECTICUT, 57.—1828.

Bill for the correction of a mistake in a discharge given by Bradley to defendant's intestate, or for an injunction against the use of the discharge in an action at law, then pending.

The action at law was on a written instrument delivered by defendant's intestate to Bradley, wherein he acknowledged himself indebted in the sum of sixty dollars to Bradley for necessaries furnished by Bradley to the father of the intestate, and promised to pay the same in case the father failed to do so. The father had since died without paying the same.

The discharge was given in settlement of an action of book debt, and by mistake was so drawn as to cover all claims and demands whatever. Bradley had demanded of the intestate the correction of the discharge, but this was refused.

On demurrer the bill was adjudged sufficient. Defendant appealed.

DAGGETT, J. The question presented on this record for discussion, arises on the validity of the promise of the deceased, Henry Cook, stated in the bill. If no action can be supported on that contract, then the interference of the court to exercise its chancery power, to explain or invalidate the discharge, would be useless; and the examination of other points suggested in argument, unnecessary. I am satisfied, on a full view of the case, that the contract is void, for want of consideration; and therefore that no action can be supported on it.

1. The contract is not a specialty, though in writing; nor is it governed by the law merchant applicable to negotiable paper. Were it of the first description, by the rules of the common law, the consideration would be locked up, and could not be inquired into. Were it a note or bill of exchange, the law merchant would give to it the same force in relation to third persons. It is true that in Pillans & Rose v. Van Mierop & Hopkins (3 Burr. 1664) a suggestion was

made by Wilmot, and the judges who sat with him in the King's Bench, that mere want of consideration could not be alleged in avoidance of a contract in writing. This suggestion was never established as law; and in the case of Rann v. Hughes (7 Term Rep. 350 n.) the true doctrine of the common law was laid down. A mere written contract is upon the footing of a parol contract, and a consideration must be proved. This is an inflexible rule of law; and the court is not at liberty, if it had the disposition, to subvert it. *Ex nudo pacto non oritur actio.*

2. What is a consideration sufficient to uphold a contract? Here, too, the common law furnishes the answer; a benefit to the party promising, or a loss to the party to whom the promise is made. The quantum of benefit, on the one hand, or of loss on the other, is immaterial. Powell on Contracts, 343, 344. To multiply authorities on this point is quite unnecessary.

Let us now apply these uncontroverted principles to the case before us. Could Henry Cook possibly receive any benefit from this contract? He gained nothing—nothing was renounced hereby. Was he induced by any loss to the promisee? He advanced nothing; he became liable for nothing; he did not forego anything, by or on the ground of it. He had before, not at the request of Henry Cook, but of Jonathan Cook, furnished the latter with necessaries for his support. It is impossible to discover, thus far, any consideration known to the law.

3. The defendant in error still insists, that the father being poor and unable to support himself, and the son being possessed of large property, a legal obligation rested on him to pay for these necessaries thus furnished; and a legal obligation is a good consideration for a promise. The conclusion is just, if the premises are true. But was there this legal obligation? If it exist, it is to be found in our statute providing for the support of paupers. Stat. 369, tit. 73, c. 1. Provision is there made, that poor and impotent persons, unable to support themselves, shall be supported by their children, if of sufficient ability. The manner in which they shall be compelled to furnish this support is prescribed. The selectmen of the town where the poor persons reside, or one or more of their relations, may make application to the county court, and the court may order such support to be supplied, by the relations of the poor persons, from the time of such application. The facts are to be ascertained by the court. The provision is prospective only. It regards no supplies already furnished, or expenses already incurred; and the liability, the legal obligation, is precisely as extensive as the law establishes it, and no greater. By this statute, then, for these reasons, the legal obligation alleged in support of this contract does not appear.

That such is the construction of this statute, I cite the opinion of

the Supreme Court of Massachusetts in Mills v. Wyman (3 Pick. Rep 207, 212) as to a similar statute of that State; and especially I rely on the decision of this court in Wethersfield v. Montague *et al.*, 3 Conn. Rep. 507. One of the points settled in that case was, that "no assessment could be made, by virtue of this statute, for *past expenditures*, the provisions of the statute being exclusively prospective." The principle then is, that there is no *legal* obligation to pay past expenditures; which exonerates the son in this case from all legal liability for the expenditures for the father.

4. This opens to us the only remaining point. The counsel for the defendant in error urge, that the son was under a *moral* obligation to support the father, that this is a *sufficient consideration* to uphold the promise, and that, therefore, the son is liable.

It cannot be successfully contended, that in every case where a person is under a moral obligation to do an act, as, to relieve one in distress by personal exertions, or the expenditure of money, a promise to that effect would be binding in a court of law. Such an idea is unsupported by principle or precedent. It is a just rule of morality, that a man should do towards others what he might reasonably expect from others in like circumstances. This rule is sanctioned by the highest authority, and is very comprehensive. An affectionate father, brother, or sister has taken by the hand the youngest son of the family, given him an education, and placed him in a situation to become, and he has become, affluent. The father, brother, or sister, by the visitation of Providence, has become poor, and impotent, and houseless. The son, rolling in riches, in the overflowings of his gratitude for kindness experienced, contracts in writing to discharge some portion of the debt of gratitude, by giving to his destitute relative some one of his numerous houses for a shelter, and a thousand of his many thousand dollars for his subsistence; can such a promise be enforced in any judicial tribunal? Municipal laws will not decide what honor or gratitude ought to induce the son to do in such a case, as Dr. Blackstone remarks (2 Bla. Com. 445), but it must be left to the forum of conscience.

It cannot be denied that many distinguished judges have laid down the principle that moral obligation is alone a sufficient consideration to support a contract. Thus did Lord Mansfield, in Cowper, 288, 544. He was followed by Mr. Justice Buller, by Lord Ellenborough, and other judges in other cases. But it is an obvious remark, that the cases cited in illustration of those positions were all cases where a prior legal obligation had existed, but by reason of some statute, or stubborn rule of law, it could not be enforced; as a promise to pay a debt barred by bankruptcy, or the statute of limitations, or a promise by an adult to pay a debt contracted during minority. In

all these instances a good consideration existed, for each had received a benefit.

All the cases on this subject are carefully, and with just discrimination, revised in a note in 3 Bos. & Pull. 249, and the true distinctions taken. The law of this note has been recently adopted in the Supreme Court of New York in the cases of Smith v. Ware (13 Johns. Rep. 257, 289) and Edwards *et ux.* v. Davis (16 Johns. Rep. 281, 283 n.), and in a still later case (in the year 1826) in Massachusetts, viz., Mills v. Wyman (3 Pick. Rep. 207)—a case referred to above for another purpose. No stronger case of *moral* obligation can be found. "A son who was of full age and had ceased to be a member of his father's family was suddenly taken sick among strangers, and being poor and in distress, was relieved by the plaintiff, and afterwards the father wrote to the plaintiff, promising to pay him the expenses incurred; it was held that such promise would not sustain an action." I am well satisfied with the very able and sound reasoning of the court delivered by Chief Justice Parker on that occasion.

I will now advert to the particular decisions of the English courts cited at the bar and relied on. Watson v. Turner, Bull. Nisi Prius, 147. It is no longer doubted that the defendants in that case, the overseers of the poor, were under a legal obligation to furnish the support for which the promise was made. It is a case, therefore, within the rule in 3 Bos. & Pull. 249 n. The case of Scott v. Nelson, cited Esp. Dig. 95, and an anonymous case in 2 Shower, 184, *seem* to imply that a father was holden liable on a promise to pay for supplies for his bastard child; but in my opinion, it may be safely inferred from the facts that the supplies were furnished on request, which would make a material difference. In Wing v. Mill (1 Barn. & Ald. 104) the whole court held that a legal and moral obligation existed. In the case of Barnes v. Hedley & Conway (2 Taunt. 184) the court held, that when the parties to usurious securities stripped them of all usury, and the securities were given up and cancelled, by agreement of the parties, and the borrower of the money promised in consideration of having received the principal, to pay the same with legal interest, the promise was binding. This case rests upon the same principles which were recognized by this court in the case of Kilborun v. Bradley (3 Day, 356), where the court decided that if a usurious security be given up, and a new security be taken for the principal sum due and legal interest, the latter security will be good. This bears not at all upon the case under consideration. The money advanced was a good consideration of the promise to repay it, the usury being expunged. In the case of Lee v. Muggeridge *et al.*, executors of Mary Muggeridge, deceased (5 Taunt. 36), it was held that a feme

covert, having given a bond for money advanced to her son-in-law, *at her request,* was bound by a promise made by her after she became discovert. Mary, the obligor in that case, had a large estate settled to her separate use. In this condition she executed a bond for money advanced to her son-in-law, at her request. After the death of the husband, and while single, she wrote a letter promising to pay the amount thus advanced. The court, in giving their opinion, say this is a promise founded on a moral obligation, and that it is a good consideration. I should say the promise was founded on the advancement of the money, at her request, to her son-in-law, and as she was incapacitated to bind herself, by reason of the coverture, when she received the benefit, and is therefore protected from liability by a stubborn rule of law, yet if when this rule of law ceases to operate upon her, she will promise to pay, it will bind her.

On the whole, I am not satisfied that a case can be found in the English books in which it has been held that a moral obligation is a sufficient consideration for an express promise, though there are many to the contrary, but that it is limited in its application to the cases where a good and valuable consideration has once existed, as laid down by the Supreme Court in Massachusetts, once and again adverted to.

I am therefore of opinion that there is error in the decree complained of, and that the judgment be reversed.

HOSMER, C. J., was of the same opinion.

PETERS and LANMAN, JJ., dissented.

BRAINARD, J., was absent.

Judgment reversed.[1]

9 Cyc. 311 (79); 312 (80–83); 313 (84); 313–315 (85–29); W. P. 199 (12). Ames, Two theories of consideration, 12 H. L. R. 515; 13 H. L. R. 29. Langdell, Mutual promises as consideration for each other, 14 H. L. R. 496.

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[1] "The mystery of consideration has possessed a peculiar fascination for writers upon the English law of contract. No fewer than three distinct theories of its origin have been put forward within the last eight years. According to one view, 'the requirements of consideration in all parol contracts is simply a modified generalization of *quid pro quo* to raise a debt by parol.' Holmes, Early English Equity, 1 L. Q. Rev. 171; The Common Law, 285. A similar opinion had been previously advanced by Professor Langdell, Contracts, § 47. On the other hand, consideration is described as 'a modification of the Roman principle of *causa*, adopted by equity, and transferred thence into the common law.' Salmond, History of Contract, 3 L. Q. Rev. 166, 178. A third learned writer derives the action of *assumpsit* from the action on the case for deceit, the damage to the plaintiff in that action being the forerunner of the 'detriment to the promisee,' which constitutes the consideration of all parol contracts. Hare, Contracts, ch. vii. and viii. To the present writer it seems impossible to refer consideration to a single source. At the present day it is doubtless just and expedient to resolve every consideration into a detriment to the promisee incurred at the request

(ii.) Consideration need not be adequate to the promise, but must be of some value in the eye of the law.

SCHNELL *v.* NELL.

17 INDIANA, 29.—1861.

Appeal from the Marion Common Pleas.

PERKINS, J. Action by J. B. Nell against Zacharias Schnell upon the following instrument:

"This agreement entered into this 13th day of February, 1856, between Zach. Schnell, of Indianapolis, Marion County, State of Indiana, as party of the first part, and J. B. Nell, of the same place, Wendelin Lorenz, of Stilesville, Hendricks County, State of Indiana, and Donata Lorenz, of Frickinger, Grand Duchy of Baden, Germany, as parties of the second part, witnesseth: The said Zacharias Schnell agrees as follows: whereas his wife, Theresa Schnell, now deceased, has made a last will and testament, in which, among other provisions, it was ordained that every one of the above named second parties should receive the sum of $200; and whereas the said provisions of the will must remain a nullity, for the reason that no property, real or personal, was in the possession of the said Theresa Schnell, deceased, in her own name, at the time of her death, and all property held by Zacharias and Theresa Schnell jointly therefore reverts to her husband; and whereas the said Theresa Schnell has also been a dutiful and loving wife to the said Zach. Schnell, and has materially aided him in the acquisition of all property, real and personal, now possessed by him; for, and in consideration of all this, and

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of the promisor. But this definition of consideration would not have covered the cases of the sixteenth century. There were then two distinct forms of consideration: (1) detriment; (2) a precedent debt. Of these detriment was the more ancient, having become established, in substance, as early as 1504. On the other hand, no case has been found recognizing the validity of a promise to pay a precedent debt before 1542. These two species of consideration, so different in their nature, are, as would be surmised, of distinct origin. The history of detriment is bound up with the history of special *assumpsit*, whereas the consideration based upon a precedent debt must be studied in the development of *indebitatus assumpsit*."—Ames, The history of assumpsit, 2 H. L. R. 1.

Mutual promises as consideration.—"Before the introduction of the action of assumpsit, a mere promise was not a consideration, as it could not create a debt; and hence purely bilateral contracts, not under seal, had then no existence in our law. But when it had become established that anything of value given or done by the promisee might be made the consideration for a promise, the courts were not long in perceiving that the making of a binding promise was giving or doing something of value, and hence that such promises were entitled to be admitted into the category of sufficient 'considerations,' (Stranborough and Warner, 1588, 4 Leon., 3; Gower v. Capper, 1597, Cro. Eliz., 543; Nicholas v. Raynbred, 1615, Hobart, 88.) Hence the introduction of bilateral contracts not under seal was one of the great changes wrought in our law of contracts by means of the action of assumpsit."—Langdell Contr., pp. 102–103. ("Peck v. Redman, 1555, Dyer, 113, appears to be the earliest case of mutual promises." Ames, in 8 H. L. R. 259, note 2).

the love and respect he bears to his wife; and, furthermore, in consideration of one cent, received by him of the second parties, he, the said Zach. Schnell, agrees to pay the above named sums of money to the parties of the second part, to wit: $200 to the said J. B. Nell, $200 to the said Wendelin Lorenz, and $200 to the said Donata Lorenz, in the following installments, viz.: $200 in one year from the date of these presents; $200 in two years, and $200 in three years; to be divided between the parties in equal portions of $66⅔ each year, or as they may agree, till each one has received his full sum of $200.

"And the said parties of the second part, for, and in consideration of this agree to pay the above named sum of money (one cent), and to deliver up to said Schnell, and abstain from collecting any real or supposed claims upon him or his estate, arising from the said last will and testament of the said Theresa Schnell, deceased.

"In witness whereof, the said parties have, on this 13th day of February, 1856, set hereunto their hands and seals.

"ZACHARIAS SCHNELL, (seal)
"J. B. NELL, (seal)
"WEN. LORENZ. (seal)"

The complaint contained no averment of a consideration for the instrument outside of those expressed in it; and did not aver that the one cent agreed to be paid had been paid or tendered.

A demurrer to the complaint was overruled.

The defendant answered, that the instrument sued on was given for no consideration whatever.

He further answered, that it was given for no consideration, because his said wife, Theresa, at the time she made the will mentioned, and at the time of her death, owned, neither separately, nor jointly with her husband or any one else (except so far as the law gave her an interest in her husband's property), any property, real or personal, etc.

The will is copied into the record, but need not be into this opinion.

The court sustained a demurrer to these answers, evidently on the ground that they were regarded as contradicting the instrument sued on, which particularly set out the considerations upon which it was executed. But the instrument is latently ambiguous on this point. See Ind. Dig., p. 110.

The case turned below, and must turn here, upon the question whether the instrument sued on does express a consideration sufficient to give it legal obligation, as against Zacharias Schnell. It specifies three distinct considerations for his promise to pay $600:

1. A promise, on the part of the plaintiffs, to pay him one cent.

2. The love and affection he bore his deceased wife, and the fact that she had done her part, as his wife, in the acquisition of property.

3. The fact that she had expressed her desire, in the form of an inoperative will, that the persons named therein should have the sums of money specified.

The consideration of one cent will not support the promise of

Schnell. It is true that as a general proposition, inadequacy of consideration will not vitiate an agreement. Baker v. Roberts, 14 Ind. 552. But this doctrine does not apply to a mere exchange of sums of money, of coin whose value is exactly fixed, but to the exchange of something of, in itself, indeterminate value for money or, perhaps, for some other thing of indeterminate value.[1] In this case, had the one cent mentioned been some particular one cent, a family piece, or ancient, remarkable coin, possessing an indeterminate value, extrinsic from its simple money value, a different view might be taken. As it is, the mere promise to pay six hundred dollars for one cent, even had the portion of that cent due from the plaintiff been tendered, is an unconscionable contract, void, at first blush, upon its face, if it be regarded as an earnest one. Hardesty v. Smith, 3 Ind. 39. The consideration of one cent is plainly in this case merely nominal, and intended to be so. As the will and testament of Schnell's wife imposed no legal obligation upon him to discharge her bequests out of his property, and as she had none of her own, his promise to discharge them was not legally binding upon him on that ground. A moral consideration only will not support a promise. Ind. Dig., p. 13. And for the same reason, a valid consideration for his promise cannot be found in the fact of a compromise of a disputed claim; for where such claim is legally groundless, a promise upon a compromise of it, or a suit upon it, is not legally binding. Spahr v. Hollingshead, 8 Blackf. 415. There was no mistake of law or fact in this case, as the agreement admits the will inoperative and void. The promise was simply one to make a gift. The past services of his wife, and the love and affection he had borne her, are objectionable as legal considerations for Schnell's promise on two grounds: 1. They are past considerations. Ind. Dig., p. 13. 2. The fact that Schnell loved his wife, and that she had been industrious, constituted no consideration for his promise to pay J. B. Nell and the Lorenzes a sum of money. Whether, if his wife, in her lifetime, had made a bargain with Schnell that, in consideration of his promising to pay, after her death, to the persons named, a sum of money, she would be industrious and worthy of his affection, such a promise would have been valid and consistent with public policy, we need not decide. Nor is the fact that Schnell now venerates the memory of his deceased wife, a legal consideration for a promise to pay any third person money.

The instrument sued on, interpreted in the light of the facts alleged in the second paragraph of the answer, will not support an action. The demurrer to the answer should have been overruled. See Stevenson v. Druley, 4 Ind. 519.

[1] Upon this point see also Shepard v. Rhodes, *post*, p. 265.

Per Curiam. The judgment is reversed, with costs. Cause remanded, etc.

9 Cyc. 357 (86); 367 (40-41); W. P. 193 (4).

HAMER *v.* SIDWAY.

124 NEW YORK, 538.—1891.

Appeal from an order of the General Term of the Supreme Court which reversed a judgment in favor of plaintiff entered at the trial at Special Term.

The action was brought by plaintiff, as assignee, against defendant, as executor, upon a contract alleged to have been made between plaintiff's remote assignor and defendant's testator.

PARKER, J. The question which provoked the most discussion by counsel on this appeal, and which lies at the foundation of plaintiff's asserted right of recovery, is whether by virtue of a contract defendant's testator William E. Story became indebted to his nephew William E. Story, 2d, on his twenty-first birthday in the sum of five thousand dollars. The trial court found as a fact that "on the 20th day of March, 1869, . . . William E. Story agreed to and with William E. Story, 2d, that if he would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become 21 years of age, then he, the said William E. Story, would at that time pay him, the said William E. Story, 2d, the sum of $5000 for such refraining, to which the said William E. Story, 2d, agreed," and that he "in all things fully performed his part of said agreement."

The defendant contends that the contract was without consideration to support it, and, therefore, invalid. He asserts that the promisee by refraining from the use of liquor and tobacco was not harmed but benefited; that that which he did was best for him to do independently of his uncle's promise, and insists that it follows that unless the promisor was benefited, the contract was without consideration. A contention which, if well founded, would seem to leave open for controversy in many cases whether that which the promisee did or omitted to do was, in fact, of such benefit to him as to leave no consideration to support the enforcement of the promisor's agreement. Such a rule could not be tolerated, and is without foundation in the law. The Exchequer Chamber, in 1875, defined consideration as follows: "A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." Courts "will not ask

whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to any one. It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made as consideration for the promise made to him." Anson's Prin. of Con. 63.

"In general, a waiver of any legal right at the request of another party is a sufficient consideration for a promise." Parsons on Contracts, 444.

"Any damage, or suspension or forbearance of a right, will be sufficient to sustain a promise." Kent, Vol. 2, 465, 12th ed.

Pollock, in his work on contracts, page 166, after citing the definition given by the Exchequer Chamber already quoted, says: "The second branch of this judicial description is really the most important one. Consideration means not so much that one party is profiting as that the other abandons some legal right in the present or limits his legal freedom of action in the future as an inducement for the promise of the first."

Now, applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years upon the strength of the promise of the testator that for such forbearance he would give him $5000. We need not speculate on the effort which may have been required to give up the use of those stimulants. It is sufficient that he restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agreement, and now having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to the promisor, and the court will not inquire into it, but were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense. Few cases have been found which may be said to be precisely in point, but such as have been support the position we have taken.

In Shadwell v. Shadwell (9 C. B. N. S. 159) an uncle wrote to his nephew as follows:

"My Dear Lancey—I am so glad to hear of your intended marriage with Ellen Nicholl, and as I promised to assist you at starting, I am happy to tell you that I will pay to you 150 pounds yearly during my life and until your annual income derived from your profession of a chancery barrister shall amount to 600 guineas, of which your own admission will be the only evidence that I shall require.

"Your affectionate uncle,
"Charles Shadwell."

It was held that the promise was binding and made upon good consideration.

In Lakota v. Newton, an unreported case in the Superior Court of

Worcester, Mass., the complaint averred defendant's promise that "if you (meaning plaintiff) will leave off drinking for a year I will give you $100," plaintiff's assent thereto, performance of the condition by him, and demanded judgment therefor. Defendant demurred on the ground, among others, that the plaintiff's declaration did not allege a valid and sufficient consideration for the agreement of the defendant. The demurrer was overruled.

In Talbott v. Stemmons (a Kentucky case not yet reported),[1] the step-grandmother of the plaintiff made with him the following agreement: "I do promise and bind myself to give my grandson, Albert R. Talbott, $500 at my death, if he will never take another chew of tobacco or smoke another cigar during my life from this date up to my death, and if he breaks this pledge he is to refund double the amount to his mother." The executor of Mrs. Stemmons demurred to the complaint on the ground that the agreement was not based on a sufficient consideration. The demurrer was sustained and an appeal taken therefrom to the Court of Appeals, where the decision of the court below was reversed. In the opinion of the court it is said that "the right to use and enjoy the use of tobacco was a right that belonged to the plaintiff and not forbidden by law. The abandonment of its use may have saved him money or contributed to his health; nevertheless, the surrender of that right caused the promise, and having the right to contract with reference to the subject-matter, the abandonment of the use was a sufficient consideration to uphold the promise." Abstinence from the use of intoxicating liquors was held to furnish a good consideration for a promissory note in Lindell v. Rokes, 60 Mo. 249. The cases cited by the defendant on this question are not in point. . . . It will be observed that the agreement which we have been considering was within the condemnation of the statute of frauds, because not to be performed within a year, and not in writing. But this defense the promisor could waive, and his letter and oral statements subsequent to the date of final performance on the part of the promisee must be held to amount to a waiver. Were it otherwise, the statute could not now be invoked in aid of the defendant. It does not appear on the face of the complaint that the agreement is one prohibited by the statute of frauds, and, therefore, such defense could not be made available unless set up in the answer. Porter v. Wormser, 94 N. Y. 431, 450. This was not done.

In further consideration of the questions presented, then, it must be deemed established for the purposes of this appeal, that on the 31st day of January, 1875, defendant's testator was indebted to William E. Story, 2d, in the sum of $5000, and if this action were founded

[1] 89 Ky., 222.

on that contract it would be barred by the statute of limitations which has been pleaded, but on that date the nephew wrote to his uncle as follows:

"DEAR UNCLE—I am now 21 years old to-day, and I am now my own boss, and I believe, according to agreement, that there is due me $5000. I have lived up to the contract to the letter in every sense of the word."

A few days later, and on February sixth the uncle replied, and, so far as it is material to this controversy, the reply is as follows:

"DEAR NEPHEW—Your letter of the 31st ult. came to hand all right saying that you had lived up to the promise made to me several years ago. I have no doubt but you have, for which you shall have $5000 as I promised you. I had the money in the bank the day you was 21 years old that I intended for you, and you shall have the money certain. Now, Willie, I don't intend to interfere with this money in any way, until I think you are capable of taking care of it, and the sooner that time comes the better it will please me. I would hate very much to have you start out in some adventure that you thought all right and lose this money in one year. . . . This money you have earned much easier than I did, besides acquiring good habits at the same time, and you are quite welcome to the money. Hope you will make good use of it. . . .

"W. E. STORY.

"P. S.—You can consider this money on interest."

The trial court found as a fact that "said letter was received by said William E. Story, 2d, who thereafter consented that said money should remain with the said William E. Story in accordance with the terms and conditions of said letter." And further, "That afterwards, on the first day of March, 1877, with the knowledge and consent of his said uncle, he duly sold, transferred, and assigned all his right, title, and interest in and to said sum of $5000 to his wife Libbie H. Story, who thereafter duly sold, transferred, and assigned the same to the plaintiff in this action."

We must now consider the effect of the letter, and the nephew's assent thereto. Were the relations of the parties thereafter that of debtor and creditor simply, or that of trustee and *cestui que trust?* If the former, then this action is not maintainable, because barred by lapse of time. If the latter, the result must be otherwise. No particular expressions are necessary to create a trust. Any language clearly showing the settler's intention is sufficient if the property and disposition of it are definitely stated. Lewin on Trusts, 55.

A person in the legal possession of money or property acknowledging a trust with the assent of the *cestui que trust,* becomes from that time a trustee if the acknowledgment be founded on a valuable consideration. His antecedent relation to the subject, whatever it may have been, no longer controls. 2 Story's Eq. § 972. If before a

declaration of trust a party be a mere debtor, a subsequent agreement recognizing the fund as already in his hands and stipulating for its investment on the creditor's account will have the effect to create a trust. Day v. Roth, 18 N. Y. 448.

It is essential that the letter interpreted in the light of surrounding circumstances must show an intention on the part of the uncle to become a trustee before he will be held to have become such; but in an effort to ascertain the construction which should be given to it, we are also to observe the rule that the language of the promisor is to be interpreted in the sense in which he had reason to suppose it was understood by the promisee. White v. Hoyt, 73 N. Y. 505, 511. At the time the uncle wrote the letter he was indebted to his nephew in the sum of $5000, and payment had been requested. The uncle, recognizing the indebtedness, wrote the nephew that he would keep the money until he deemed him capable of taking care of it. He did not say "I will pay you at some other time," or use language that would indicate that the relation of debtor and creditor would continue. On the contrary, his language indicated that he had set apart the money the nephew had "earned" for him, so that when he should be capable of taking care of it he should receive it with interest. He said: "I had the money in the bank the day you were 21 years old that I intended for you, and you shall have the money certain." That he had set apart the money is further evidenced by the next sentence: "Now, Willie, I don't intend to interfere with this money in any way until I think you are capable of taking care of it." Certainly, the uncle must have intended that his nephew should understand that the promise not "to interfere with this money" referred to the money in the bank which he declared was not only there when the nephew became 21 years old, but was intended for him. True, he did not use the word "trust," or state that the money was deposited in the name of William E. Story, 2d, or in his own name in trust for him, but the language used must have been intended to assure the nephew that his money had been set apart for him, to be kept without interference until he should be capable of taking care of it, for the uncle said in substance and in effect: "This money you have earned much easier than I did . . . you are quite welcome to. I had it in the bank the day you were 21 years old, and don't intend to interfere with it in any way until I think you are capable of taking care of it, and the sooner that time comes the better it will please me." In this declaration there is not lacking a single element necessary for the creation of a valid trust, and to that declaration the nephew assented.

The learned judge who wrote the opinion of the General Term, seems to have taken the view that the trust was executed during the lifetime of defendant's testator by payment to the nephew, but as it does not appear from the order that the judgment was reversed on the

facts, we must assume the facts to be as found by the trial court, and those facts support its judgment.

The order appealed from should be reversed and the judgment of the Special Term affirmed, with costs payable out of the estate.

All concur.

Order reversed and judgment of Special Term affirmed.[1]

9 Cyc. 315 (31); W. P. 185 (1); 195 (8).

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a. First test of reality. Did the promisee do, forbear, suffer, or promise anything in respect of the promise?

Motive must be distinguished from consideration.

FINK *v.* COX.

18 JOHNSON (N. Y.), 145.—1820.

Assumpsit to recover the amount of a promissory note given by defendant's testator to his son, the plaintiff. Verdict for plaintiff, subject to the opinion of the court as to the law of the case.

SPENCER, C. J., delivered the opinion of the court. The question in this case is, whether there is a sufficient consideration for the note on which this suit is founded. It appears from the declaration of the testator when the note was given, that he intended it as an absolute gift to his son, the plaintiff; alleging that the plaintiff was not so

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[1] In Dunton v. Dunton, 18 Vict. L. R. 114, defendant promised his divorced wife that he would pay her £6 per month "so long as she shall conduct herself with sobriety and in a respectable, orderly and virtuous manner." It was held that inasmuch as she was legally at liberty to conduct herself in these respects as she might think fit, the surrender of such liberty would be good consideration.

In Hoshor v. Kautz, 19 Wash. 258, the defendant promised plaintiff $360 a year for four years if he would attend a specified university as a student. Plaintiff attended the university and this was held a sufficient consideration.

In Brooks v. Ball, 18 Johns. (N. Y.) 337, the question was, "whether a promise to pay a sum claimed to be due by one party and denied by the other, if the party claiming would swear to the correctness of the claim, and he does so swear, is a valid promise." It was held "that such a promise as the present is good in point of law, and that the making the proof or affidavit, whether by a third person or by the party himself, is a sufficient consideration for the promise. It is not making a man a judge in his own cause, but it is referring a disputed fact to the conscience of the party. It is begging the question to suppose that it will lead to perjury. If the promise is binding, because the making the proof or affidavit is a consideration for it, the defendant must necessarily be precluded from gainsaying the fact. He voluntarily waives all other proof; and to allow him to draw in question the verity or correctness of the proof or affidavit would be allowing him to alter the conditions of his engagement and virtually to rescind his promise."

wealthy as his brothers, that he had met with losses, and that he and his brothers had had a controversy about a stall. Such were the reasons assigned for his giving the note to the plaintiff.

There can be no doubt that a consideration is necessary to uphold the promise, and that it is competent for the defendant to show that there was no consideration. 17 Johns. Rep. 301; Schoonmaker v. Roosa and De Witt. The only consideration pretended is that of natural love and affection from a father to a child; and if that is a sufficient consideration, the plaintiff is entitled to recover, otherwise not.

It is conceded that the gift, in this case, is not a *donatio causa mortis,* and cannot be supported on that ground. In Pearson v. Pearson (7 Johns. Rep. 26) the question was, whether the gift of a note signed by the defendant to the plaintiff was such a vested gift, though without consideration, as to be valid in law; we held that it was not, and that a parol promise to pay money, as a gift, was no more a ground of action than a promise to deliver a chattel as a gift; and we referred to the case of Noble v. Smith (2 Johns. Rep. 52), where the question underwent a full discussion and consideration. The case of Grangiac v. Arden (10 Johns. Rep. 293) was decided on the principle that the gift of the ticket had been completed by delivery of possession, and is in perfect accordance with the former cases.

It has been strongly insisted that the note in the present case, although intended as a gift, can be enforced on the consideration of blood. It is undoubtedly a fair presumption that the testator's inducement to give the note sprang from parental regard. The consideration of blood, or natural love and affection, is sufficient in a deed, against all persons but creditors and *bona fide* purchasers; and yet there is no case where a personal action has been founded on an executory contract, where a consideration was necessary, in which the consideration of blood, or natural love and affection, has been held sufficient. In such a case the consideration must be a valuable one, for the benefit of the promisor, or to the trouble, loss, or prejudice of the promisee. The note here manifested a mere intention to give the one thousand dollars. It was executory, and the promisor had a *locus pœnitentiæ.* It was an engagement to give, and not a gift. None of the cases cited by the plaintiff's counsel maintain the position, that because a parent, from love and natural affection, engages to give his son money, or a chattel, that such a promise can be enforced at law.

Judgment for the defendant.

9 Cyc. 319 (71); W. P. 9 (4).

RICKETTS v. SCOTHORN.

57 NEBRASKA, 51.—1898.

SULLIVAN, J. In the District Court of Lancaster County the plaintiff Katie Scothorn recovered judgment against the defendant Andrew D. Ricketts, as executor of the last will and testament of John C. Ricketts, deceased. The action was based upon a promissory note, of which the following is a copy:

"May the first, 1891. I promise to pay to Katie Scothorn on demand, $2000 to be at 6 per cent per annum.

"J. C. RICKETTS."

In the petition the plaintiff alleges that the consideration for the execution of the note was that she should surrender her employment as bookkeeper for Mayer Bros. and cease to work for a living. She also alleges that the note was given to induce her to abandon her occupation, and that, relying on it, and on the annual interest, as a means of support, she gave up the employment in which she was then engaged. These allegations of the petition are denied by the excutor. The material facts are undisputed. They are as follows: John C. Ricketts, the maker of the note, was the grandfather of the plaintiff. Early in May,—presumably on the day the note bears date,—he called on her at the store where she was working. What transpired between them is thus described by Mr. Flodene, one of the plaintiff's witnesses:

A. Well the old gentleman came in there one morning about 9 o'clock,—probably a little before or a little after, but early in the morning,—and he unbuttoned his vest and took out a piece of paper in the shape of a note; that is the way it looked to me; and he says to Miss Scothorn, "I have fixed out something that you have not got to work any more." He says, "None of my grandchildren work and you don't have to."

Q. Where was she?

A. She took the piece of paper and kissed him; and kissed the old gentleman and commenced to cry.

It seems Miss Scothorn immediately notified her employer of her intention to quit work, and that she did soon after abandon her occupation. The mother of the plaintiff was a witness and testified that she had a conversation with her father, Mr. Ricketts, shortly after the note was executed, in which he informed her that he had given the note to the plaintiff to enable her to quit work; that none of his grandchildren worked and he did not think she ought to. For something more than a year the plaintiff was without an occupation; but in September, 1892, with the consent of her grandfather, and by his assistance, she secured a position as bookkeeper with Messrs. Funke &

Odgen. On June 8, 1894, Mr. Ricketts died. He had paid one year's interest on the note, and a short time before his death expressed regret that he had not been able to pay the balance. In the summer or fall of 1892, he stated to his daughter, Mrs. Scothorn, that if he could sell his farm in Ohio he would pay the note out of the proceeds. He at no time repudiated the obligation.

We quite agree with counsel for the defendant that upon this evidence there was nothing to submit to the jury, and that a verdict should have been directed peremptorily for one of the parties.

The testimony of Flodene and Mrs. Scothorn, taken together, conclusively establishes the fact that the note was not given in consideration of the plaintiff pursuing, or agreeing to pursue, any particular line of conduct. There was no promise on the part of the plaintiff to do or refrain from doing anything. Her right to the money promised in the note was not made to depend upon an abandonment of her employment with Mayer Bros. and future abstention from like service. Mr. Ricketts made no condition, requirement, or request. He exacted no *quid pro quo*. He gave the note as a gratuity and looked for nothing in return. So far as the evidence discloses, it was his purpose to place the plaintiff in a position of independence, where she could work or remain idle as she might choose. The abandonment by Miss Scothorn of her position as bookkeeper was altogether voluntary. It was not an act done in fulfillment of any contract obligation assumed when she accepted the note. The instrument in suit being given without any valuable consideration, was nothing more than a promise to make a gift in the future of the sum of money therein named.

Ordinarily, such promises are not enforceable even when put in the form of a promissory note. Kirkpatrick v. Taylor, 43 Ill. 207; Phelps v. Phelps, 28 Barb. N. Y. 121; Johnston v. Griest, 85 Ind. 503; Fink v. Cox, 18 Johns. N. Y. 145. But it has often been held that an action on a note given to a church, college, or other like institution, upon the faith of which money has been expended or obligations incurred, could not be successfully defended on the ground of a want of consideration. Barnes v. Perine, 12 N. Y. 18; Philomath College v. Hartless, 6 Ore. 158; Thompson v. Mercer County, 40 Ill. 379; Irwin v. Lombard University, 56 O. St. 9. In this class of cases the note in suit is nearly always spoken of as a gift or donation, but the decision is generally put on the ground that the expenditure of money or assumption of liability by the donee, on the faith of the promise, constitutes a valuable and sufficient consideration. It seems to us that the true reason is the preclusion of the defendant, under the doctrine of estoppel, to deny the consideration. Such seems to be the view of the matter taken by the supreme court of Iowa in the case of Simpson Centenary College v. Tuttle (71 Ia. 596), where Rothrock,

J., speaking for the court, said: "Where a note, however, is based on a promise to give for the support of the objects referred to, it may still be open to this defense [want of consideration], unless it shall appear that the donee has, prior to any revocation, entered into engagements or made expenditures based on such promise, so that he must suffer loss or injury if the note is not paid. This is based on the equitable principle that, after allowing the donee to incur obligations on the faith that the note would be paid, the doner would be estopped from pleading want of consideration." And in the case of Reimensnyder v. Gans (110 Pa. St. 17), which was an action on a note given as a donation to a charitable object, the court said: "The fact is that, as we may see from the case of Ryerss v. Trustees (33 Pa. St. 114), a contract of the kind here involved is enforceable rather by way of estoppel than on the ground of consideration in the original undertaking." It has been held that a note given in expectation of the payee performing certain services, but without any contract binding him to serve, will not support an action. Hulse v. Hulse, 84 Eng. Com. Law, 709. But when the payee changes his position to his disadvantage, in reliance on the promise, a right of action does arise. McClure v. Wilson, 43 Ill. 356; Trustees v. Garvey, 53 Ill. 401.

Under the circumstances of this case is there an equitable estoppel which ought to preclude the defendant from alleging that the note in controversy is lacking in one of the essential elements of a valid contract? We think there is. An estoppel *in pais* is defined to be "a right arising from acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged." Mr. Pomeroy has formulated the following definition: "Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, or contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy." 2 Pomeroy, Equity Jurisprudence, 804.

According to the undisputed proof, as shown by the record before us, the plaintiff was a working girl, holding a position in which she earned a salary of $10 per week. Her grandfather, desiring to put her in a position of independence, gave her the note, accompanying it with the remark that his other grandchildren did not work, and that she would not be obliged to work any longer. In effect he suggested that she might abandon her employment and rely in the future upon the bounty which he promised. He, doubtless, desired that she should give up her occupation, but whether he did or not, it is entirely certain that he contemplated such action on her part as a reasonable and

probable consequence of his gift. Having intentionally influenced the plaintiff to alter her position for the worse on the faith of the note being paid when due, it would be grossly inequitable to permit the maker, or his executor, to resist payment on the ground that the promise was given without consideration. The petition charges the elements of an equitable estoppel, and the evidence conclusively establishes them. If errors intervened at the trial they could not have been prejudicial. A verdict for the defendant would be unwarranted. The judgment is right and is

Affirmed.

W. P. 650 (1); 12 H. L. R. 506; 12 Yale Law Journal, 422–423 (Ashley); Langdell, Cont., § 79.

Consideration must move from promisee.

NOTE.—For cases on the proposition that the consideration must move from the promisee, see cases under "Limits of Contractual Obligation," *post*, Part II. Ch. I.

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b. Second test of reality. Was the promisee's act, forbearance, sufferance, or promise of any ascertainable value?

Prima facie *impossibility.*

BEEBE *v.* JOHNSON.

19 WENDELL (N. Y.), 500.—1838.

This was an action of covenant.

On the 21st January, 1833, Johnson, for the consideration of $5000, conveyed by deed to Beebe, the *sole* and *exclusive right* to make, use, and vend in Upper and Lower Canada, in certain counties of this State, and in other places, a threshing machine which had been patented to one Warren, and *covenanted to perfect the patent right in England as soon as practicable and within a reasonable space of time,* so as to secure to Beebe the entire control of the provinces of Upper and Lower Canada. In April, 1834, Beebe commenced this suit, and in his declaration, after setting forth the contract, averred, that although a reasonable time for the purpose had long since elapsed, that Johnson had not perfected the patent right in England, or otherwise secured to him the sole and exclusive right of making, using, and vending the machine in the provinces of Upper and Lower Canada. He further averred, that Johnson and himself being citizens of the United States, Johnson could not obtain, either for himself or for Beebe, the plaintiff, from the proper authorities in Canada, the exclusive right of vending the machine within those provinces; and so, he said, John-

son had not kept his covenant. The defendant pleaded the general issue, and gave notice of special matter to be proved on the trial. On the trial of the cause the plaintiff read in evidence a letter of the defendant, dated 8th April, 1833, in which he admitted, in substance, that in the negotiation between the parties the exclusive right of vending the machine in the Canadas had been estimated at $500. The plaintiff also proved by a witness, who had been employed in the Canadas by him in vending the article, that the exclusive right of vending it there would, in his opinion, be worth $500. By a written stipulation between the parties, it was admitted that the patent right could not be perfected in England, because the authority to grant letters patent for such improvements was vested in the provinces, and that in the provinces the exclusive right of vending improvements of this nature can be conferred upon a *subject of Great Britain,* and a *resident of the provinces,* and that the *patentee,* the *plaintiff,* and the *defendant* are all citizens of the United States, and cannot become subjects of Great Britain short of a residence in the provinces of seven years. The jury found a verdict for the plaintiff of $601.23, being the sum of $500, with the interest thereof from the date of the deed declared upon. The defendant's counsel having moved for a *nonsuit,* which was overruled, and having excepted to the charge of the judge, now moved for a new trial. The principal grounds relied upon in support of the application will appear from the opinion delivered refusing a new trial.

NELSON, C. J. It is supposed by the counsel for the defendant that a legal impossibility prevented the fulfilment of the covenant to perfect the patent right in England, so as to secure the monopoly of the Canadas to the plaintiff, and hence that the obligation was dispensed with, so that no action can be maintained. There are authorities which go that length, Co. Litt. 206, b.; Shep. Touch. 164; 2 Co. Litt. 26; Platt. on Cov. 569; but if the covenant be within the range of possibility, however absurd or improbable the idea of the execution of it may be, it will be upheld: as where one covenants it shall rain tomorrow, or that the Pope shall be at Westminster on a certain day. To bring the case within the rule of dispensation, it must appear *that the thing to be done cannot by any means be accomplished;* for, if it is only improbable, or out of the power of the obligor, it is not in law deemed impossible. 3 Comyn's Dig. 93; 1 Roll. Abr. 419. Now it is clear that the fulfilment in this case cannot be considered an impossibility within the above exposition of the rule; because, for anything we know to the contrary, the exclusive right to make, use, and vend the machine in the Canadas, might have been secured in England by act of Parliament or otherwise; at least, there is nothing in all this necessarily impossible. These provinces are a part of the British Empire, and subject to the power of the Parliament at home; which body

might very well grant the privilege the defendant covenanted to procure. Certainly we are unable to say the government cannot or would not *by any means* grant it. There is, then, nothing in the case to take it out of the rule in Paradine v. Jane (Aleyn, 27) as expounded by Chambre, J., in Beale v. Thompson (3 Bos. & Pull. 420), namely, if a party enter into an absolute contract without any qualification or exception, and receives from the party with whom he contracts the consideration of such engagement, he must abide by the contract, and either do the act or pay damages; his liability arising from his own direct and positive undertaking. 6 T. R. 750; 8 Id. 267, Lawrence, J.; 10 East, 533; 4 Carr. & Payne, 295; 1 Selw. 344.

It has also been said that the action cannot be maintained, as the covenant contemplated the violation of the laws of England. We are unable to perceive the force of this objection, as the fulfilment of the covenant necessarily required the procurement of lawful authority to make and vend the machine in the Canadas. It is difficult to understand how this could be accomplished by other than lawful means. That it might be by such, we have already considered not impossible.

Again, it was said the contract was void because it contemplated a renunciation of citizenship by the defendant. Whether, if the fact was admitted, the consequence would follow, we need not stop to consider, because it is very clear that no such step is necessarily embraced in the covenant. For aught we know, the patent might be procured without such renunciation; and if it were considered unlawful to contract for expatriation, inasmuch as this agreement does not necessarily contemplate it, we would be bound to hold that the defendant assumed to procure the patent without it. But even in England, the common law rule against the expatriation of the subject is so far modified that naturalization abroad for commercial purposes is recognized, and is of course lawful. 1 Comyn, 677; 8 T. R. 31; 1 Bos. & Pull. 430, 440, 444; 2 Kent's Comm. 49; 1 Peter's C. C. R. 159. In the case of Wilson v. Marryat (8 T. R. 31, and 1 Bos. & Pull. 430) it was decided that Collet, a natural-born subject of Great Britain, having become a citizen of the United States, according to our laws, was entitled to all the advantages of an American citizen under the treaty of 1794. There the defendant undertook to avoid a policy of insurance procured by the plaintiff for the benefit of Collet upon an American ship and cargo, of which he was master, on the ground that he was a British subject, and therefore the trade in which he was engaged illegal, being in violation of the privileges of the East India Company, which trade was secured to American citizens by the treaty of 1794.

New trial denied.

9 Cyc. 326 (12–14); 327 (15–18); W. P. 522 (1); 530 (13).

STEVENS *v.* COON.

1 PINNEY (WIS.), 356.—1843.

DUNN, C. J. Error is brought in this case to reverse a judgment of the District Court of Jefferson County.

Coon, plaintiff below, brought his action of assumpsit against Stevens, defendant below, to recover damages on a liability growing out of a contract, which is in the words, etc., following, viz.:

"ASTOR, March 23, 1839.

"In consideration of C. J. Coon entering the west half of the northwest quarter of section 35, in town 13, range 13, I bind myself that the said eighty acres of land shall sell, on or before the 1st October next, for two hundred dollars or more, and the said Coon agrees to give me one-half of the amount over two hundred dollars said land may sell for in consideration of my warranty.

"HAMILTON STEVENS.

"I agree to the above contract.

"C. J. COON."

At the August term of the said Jefferson County District Court, in the year 1840, the said defendant Stevens pleaded the general issue which was joined by the said plaintiff Coon, and after several continuances the case was tried at the October term, 1842. On the trial, the above contract, and the receiver's receipt to said plaintiff Coon, for the purchase money for said tract of land described in said contract, were read in evidence to the jury; and Abraham Vanderpool, a witness, testified "that he had visited that part of the country where the land lies, specified in said writing, and was upon the same, as he has no doubt, and estimated the present value of the same at $1.50 per acre, and that in October, 1839, it might be worth $1.25 an acre." Upon this evidence and testimony the plaintiff rested his case.

Under the construction put on the contract read in evidence, the jury found for the plaintiff $116.50 in damages, and judgment was entered thereon. There is manifest error in this decision of the court. From an inspection of the contract, it is obvious that it is not such an one as is obligatory on either party. There is no reciprocity of benefit, and it binds the defendant below to the performance of a legal impossibility, so palpable to the contracting parties that it could not have been seriously intended by the parties as obligatory on either. The undertaking of the defendant below is, "that plaintiff's tract of land shall sell for a certain sum by a given day." Is it not legally impossible for him to perform this undertaking? Certainly, no man can in legal contemplation force the sale of another's property by a given day, or by any day, as of his own act. The plaintiff was well apprised of the deficiency of his contract on the

trial, as the testimony of his witness was entirely apart from the contract sued on, and was directed in part to a different contract, and such an one as the law would have recognized. If the contract had been that the tract of land would be worth $200 by a given day, then it could have been recovered on, if it did not rise to that value in the time. 1 Comyn on Contracts, 14, 16, 18; Comyn's Dig., title "Agreement"; 1 Pothier on Obligations, 71; 6 Petersdorf's Abridg. 218; 2 Sand. 137 (d). The District Court should not have entered judgment on the finding of the jury in this case. The construction of the contract by the District Court was erroneous.

Judgment reversed with costs.

9 Cyc. 326 (14).

Uncertainty.

SHERMAN *v.* KITSMILLER, Adm'r.

17 SERGEANT & RAWLE (PENN.), 45.—1827.

DUNCAN, J. The declaration contains four counts:

1. On the special promise to give Elizabeth Koons one hundred acres of land, in consideration that she should live with the intestate, as his housekeeper, until her marriage, with an averment that she did live with him, and keep his house until her marriage.

2. That he would give her one hundred acres of land, if she lived with him until her marriage, and married the plaintiff, George Sherman, with an averment that she did live with him until she intermarried with George Sherman.

3. It is a promise to give her one hundred acres of land, if she married George Sherman, with an averment that she intermarried with George Sherman.

4. Is a *quantum meruit* for work, labor, and services.

The error assigned is, in that part of a long charge in which the court say, "There can be no recovery, unless there was a legal promise, seriously made; if a promise is so vague in its terms as to be incapable of being understood, and of being carried into effect, it cannot be enforced. If George Sherman had reference to no particular lands, if he did not excite or intend to excite, a hope or expectation in Elizabeth Koons, that after her marriage with George Sherman she should get any land, such promise would not be so perfect as to furnish the ground of an action for damages. But if George Sherman was seized of several tracts in the vicinity, and he promised her one hundred acres, in such a manner as to excite an expectation in her that it was a particular part of his lands so held by him, though not particularly describing or specifying its value, or by whom; and if, in pursuance

of such promise, she did marry George Sherman, then the action might be sustained."

Now, let us put the case of the plaintiffs in the most favorable light, without regarding the form of the declaration, and admit that the proof met the allegation, the special promise of the one hundred acres of land, the consideration of the promise, marriage, and its execution, and living with the defendant's intestate until the marriage, the charge of the court was, in the particular complained of, more favorable to the plaintiffs than their case warranted. It should have been, on the question put to the court, that the promise could not support the action; that the defendant's intestate did not assume to convey any certain thing, to convey any certain or particular land, or that could, with reference to anything said by him, refer to anything certain. Whereas the court submitted to the jury whether it did refer to anything certain, viz., lands of the intestate in the vicinity; and that without one spark of evidence to authorize the jury to make such an inference or draw such conclusion. And if the verdict had been for the plaintiffs, on either of these three counts, the judgment would have been reversed for this error. The jury have found that the promise referred to nothing certain, no particular lands anywhere of which the promisor was seized. Except the count on the *quantum meruit,* for the reasonable allowance for the services of Elizabeth Koons, it was not an action of *indebitatus assumpsit,* but an action on the special contract—an action to recover damages sustained by the plaintiff for the breach of a promise to convey one hundred acres of land, an action for not specifically executing the contract. There can be no implied promise, because, whatever the undertaking was as to the one hundred acres, it was express; the action is brought on the express promise, and that only lies where a man by express words assumes to do a certain thing. Com. Dig., title "Assumpsit upon an Express Promise," A. 3. Not that this means an absolute certainty, but a certainty to a common intent, giving the words a reasonable construction. But the words must show the undertaking was certain; for, in *assumpsit* for non-payment of money, it is necessary to reduce the amount to a certainty; or, on a *quantum meruit,* by an averment, where the amount does not otherwise appear. Express promises or contracts ought to be certain and explicit, to a common intent at least. 1 Com. on Cont. They may be rendered certain by a reference to something certain, and the cases to be found in the books as to the nature of this reference are generally on promises of marriage; as, where A, in consideration that B would marry his daughter, promised to give with her a child's portion, and that at the time of his death he would give to her as much as any of his other children, except his eldest son,—this was holden to be a good promise; for, although a *child's portion* is altogether uncertain, yet *what the rest of the chil-*

dren, except the eldest, got, reduces it to a sufficient certainty. Silvester's Case, Popham, 148; 2 Roll. Rep. 104. But if a citizen of London promises a child's portion, that of itself is sufficiently certain; for, by the custom there, it is certain how much each child shall have. 2 Roll. Rep. 104; 1 Lev. 88. Now here, the court instructed the jury, that if they could find this promise to refer to anything certain, any land in particular, the action could be maintained. This was leaving it to the jury more favorably for the plaintiffs than ought to have been done; for the jury should have been instructed, that as there was nothing certain in the promise, nothing referred to, to render it certain, the action could not be maintained. The contract was an express one,—nothing could be raised by implication,—no other contract could be implied. By the statute of frauds and perjuries, such a promise would be void in England, not being in writing; and, although that provision is not incorporated in our act on the subject, this would be matter of regret, if such loose speeches should be held to amount to a solemn binding promise, obliging the speaker to convey one hundred acres of his homestead estate, or pay the value in money. If a certain explicit, serious promise was made with her, though not in writing, if marriage was contracted on the faith of it, and the promise was certain of some certain thing, it would be binding.

There would, in the present case, be no specific performance decreed in a court of chancery; the promisor himself would not know what to convey, nor the promisee what to demand. If it had been a promise to give him one hundred pieces of silver, this would be too vague to support an action; for what pieces?—fifty-cent pieces or dollars?—what denomination? One hundred cows or sheep would be sufficiently certain, because the intention would be, that they should be at least of a middling quality; but one hundred acres of land, without locality, without estimation of value, without relation to anything which could render it certain, does appear to me to be the most vague of all promises; and, if any contract can be void for its uncertainty, this must be. One hundred acres on the Rocky Mountains, or in the Conestoga Manor—one hundred acres in the mountains of Hanover County, Virginia, or in the Conewango rich lands of Adams County—one hundred acres of George Sherman's mansion-place at eighty dollars per acre, or one hundred acres of his barren lands at five dollars.

This vague and void promise, incapable of specific execution, because it has nothing specific in it, would not prevent the plaintiffs from recovering in a *quantum meruit* for the value of this young woman's services until her marriage. If this promise had been that, in consideration of one hundred pounds, the defendant's testator promised to convey her one hundred acres of land, chancery would not decree a specific performance, or decree a conveyance of any par-

ticular land; yet the party could recover back the money he had paid in an action. As, where a young man, at the request of his uncle, lived with him, and his uncle promised to do by him as his own child, and he lived and worked with him above eleven years; and his uncle said his nephew should be one of his heirs, and spoke of advancing a sum of money to purchase a farm for him as a compensation for his services, but died without doing anything for his nephew, or making him any compensation, it was held that an action on an implied assumpsit would lie against the executors for the work and labor performed by the nephew for the testator. Jacobson v. The Executors of Le Grange, 3 Johns. 199. In Conrad v. Conrad's Administrators (4 Dall. Pa. 130) a plantation was bought by the plaintiff, an illegitimate son of the defendant's intestate, on a special agreement that if the plaintiff would live with the intestate, and work his plantation for six years, he would give and convey to him one hundred acres of the land. This was held a good promise, because it was certain—one hundred acres of the plantation on which the father lived. But in this case the jury have negatived all idea of an agreement to give Miss Koons one hundred acres of any particular kind or quality of land, of any certain description, on which any value could be put. In 2 Yeates, 522, in an action on a promise to convey a tract of land in Northumberland County to the plaintiff, the promise was in the first instance gratuitous, but the plaintiff had paid the scrivener to draw the conveyance, which was held to be a sufficient consideration for the promise; the action was for damages for not conveying it. No evidence was given of the value of the land. The court stated the difficulty of giving damages for not conveying lands of the value of which nothing appeared. The plaintiff's counsel admitted the want of evidence of the value of the land was an incurable defect. If the defect of evidence of value would be incurable, the defect of all allegation or proof of anything by which the value could be regulated, anything to afford a clue to the jury by which to discover what was intended to be given, any measure of damages, would be fatal. The promise is as boundless as the terrestrial globe. The party would lie at the mercy of the jury—there would be the same reason for ten thousand dollars damages as ten cents. The court could not set aside the verdict in any case, either on account of extravagance or smallness of damages, for there is nothing by which to measure them; but the arbitrary discretion or the caprice of the jury must decide them, without evidence and without control. It cannot be compared to actions of slander, where the jury have a wide range, and must exercise some latitude,—it is an action on an express promise, which the law says must be to perform something either certain to a common intent, or by a reference to something which can render it certain. In contracts which can be enforced specifically, or where damages are to be given

for their non-performance, there is always a measure of damages; in actions affecting the reputation, the person, or the liberty of a man, they must depend, in some measure, on the direction of the jury. If the jury go beyond the standard, the value ascertained by evidence of the thing contracted for, or under its value, the court will set aside the verdict, but in the vindictive class of actions, the damages must be outrageous to justify the interference of the court,—seldom, if ever, for smallness of damages. There is a great difference between damages which can be ascertained, as in assumpsit, trover, etc., where there is a measure, and personal torts, as false imprisonment, slander, malicious prosecution, where damages are matter of opinion. To say that nominal damages, at least, ought to be given, is taking for granted the very matter in controversy; for the legal question is, was there an actionable promise—a promise to do anything certain, or certain to a common intent, or where, by reference to anything, it would be rendered certain? The jury have negatived all this.

I am therefore of opinion that there was no error in the opinion of the court, by which the plaintiffs have been endamaged; that the law was laid down more favorably for them than the evidence warranted.

Judgment affirmed.[1]

9 Cyc. 248 (42); 325 (5-6); W. P. 49 (54).

HART *v.* GEORGIA RAILROAD COMPANY.

101 GEORGIA, 188.—1897.

Action by Eva F. Hart against the Georgia Railroad Company. A general demurrer to the complaint was sustained, and plaintiff brings error.

COBB, J. Mrs. Hart sued the Georgia Railroad Company, alleging in her petition that the defendant was engaged as a common carrier in the carrying of passengers, and that an eating station for the comfort and convenience of passengers on the road was practically a necessity, and the establishment of such a station would be a great advantage to the road in increasing its popularity and patronage; that the company, through its duly-authorized agent and officer, cove-

[1] In The United Press v. New York Press Co., 164 N. Y. 406, it was held that an executory contract in writing, attempting to provide over a period of years for the furnishing of news reports on each day at a price "not exceeding three hundred dollars during each and every week that said news report is received," is so indefinite as to the price to be paid as to preclude a recovery of substantial damages for its breach in refusing to receive the service; the court saying that "because of the indefiniteness of the obligation, only nominal damages were recoverable."

nanted and agreed with her that, if she would erect at the station of Union Point a permanent and first-class eating house for the accommodation of the traveling public, and maintain the same in a first-class manner, the company, by the patronage of its road, would maintain and support the same. In consideration of such representations and promises, and of the profits anticipated from the patronage, she agreed to erect such a house, and maintain or cause it to be maintained in first-class style, promising further to accommodate the employés of said company thereat for a reduced price, to wit, 25 cents for meals, being one-half the regular price. It was further alleged that in accordance with the terms of the agreement a first-class hotel was erected and maintained, and that the contract was fully performed on her part. It was also alleged that said company discontinued stopping its trains for meals at Union Point until only one train was stopped for that purpose, the patronage of which was not sufficient to make the business of maintaining an eating house profitable; that the business was wholly dependent for support upon the patronage of the trains of the company, and could not be otherwise sustained; and since the stopping of the trains she is unable to conduct the business at all, and has lost the entire profits which could have been derived therefrom, to the net annual value of $4000. To the declaration the defendant filed a general demurrer, which was sustained, and the plaintiff excepted.

The contract as declared on contained an obligation on the part of the plaintiff to erect "a permanent and first-class hotel for the accommodation of the traveling public, and maintain the same in a first-class manner," and the obligation on the part of the road that it, "by the patronage of its road, would maintain and support the same." The whole of the alleged parol contract is contained in the words quoted. What is a first-class hotel? How is a hotel maintained in a first-class manner? What is the patronage of a road running trains day and night at a given point? Is the stopping of every train necessary to maintain and support an eating house at such point? If not, how many trains, and what trains? Suppose the plaintiff had failed to erect an hotel, what character of building could she have been compelled to erect under this contract? That she did erect an hotel which, in her opinion, was a first-class hotel, and that she did maintain the same in what she understood to be a first-class manner, cannot make certain and definite stipulations in the contract declared on, which are otherwise vague and indefinite. Construing the declaration as a whole, it is impossible to determine with certainty what was the contract between the parties, and therefore it is impossible to determine what would be the damages arising from a failure to carry out the alleged contract. As the language alleged does not

make a contract between the parties which is capable of enforcement, there was no error in dismissing the declaration on demurrer.

Judgment affirmed.

9 Cyc. 248 (42); W. P. 49-51 (54-59).

Forbearance to sue.

DI IORIO *v.* DI BRASIO.

21 RHODE ISLAND, 208.—1899.

MATTESON, C. J. [On reargument.] This is an action of assumpsit. The declaration avers that, one Lungo being indebted to the plaintiff in the sum of $40, the defendant, in consideration thereof, and in further consideration of the request by the defendant to forbear and give time to said Lungo for the payment of said $40 until August 24, 1897, undertook and promised the plaintiff to pay him said sum of $40 on August 24, 1897, if said Lungo should then fail to make said payment according to the terms of a certain contract in writing in the Italian language, a translation of which is annexed to the writ. The declaration goes on to aver the forbearance of the plaintiff to sue Lungo in consequence of the agreement to forbear, and then to aver the failure of Lungo to make payment on the date specified, whereby the defendant became liable to pay the plaintiff the $40, etc. The defendant pleaded, among other pleas, that Lungo was not indebted to the plaintiff as alleged. To this plea the plaintiff demurred. One of the grounds of demurrer was that it was immaterial whether Lungo was ever indebted to the plaintiff, since the plaintiff forbore to press his *bona fide* claim against him, and the defendant, in consideration of such forbearance, promised to pay the claim at the end of one year if Lungo did not. The district court of the Sixth judicial district, in which the suit was brought, sustained the demurrer. The case was then tried, and the court gave its decision for the plaintiff for $40. The defendant excepted to the ruling of the district court sustaining the demurrer, and also to its ruling excluding the testimony which he offered to show that Lungo was never indebted to the plaintiff in any sum whatever. The case was before us on these exceptions, and we filed a rescript overruling the exceptions, and remitting the case to the district court, with directions to enter judgment on its decision. Thereupon the defendant asked for and obtained a reargument.

We think the plea demurred to was insufficient. The words of the plea that Lungo was not indebted to the plaintiff were equivalent to saying merely that the plaintiff had no valid claim against Lungo, but it was not enough to constitute a defense to the suit that the

plaintiff should not have had a *valid* claim. All that is required to sustain the action is that the forbearance should have been in respect to a claim which the plaintiff honestly believed to be just, even though, if such claim had been originally prosecuted, it would have been defeated. Callisher v. Bischoffsheim, L. R. 5 Q. B. 449; Ockford v. Barrelli, 25 Law T. R. (N. S.) 504; Miles v. Estate Co., 32 Ch. Div. 267; Cook v. Wright, 1 Best & S. 559; 6 Am. & Eng. Enc. Law (2d ed.) 742.

Our opinion is therefore that the demurrer was properly sustained and the plea overruled. For the same reason the court committed no error in excluding the testimony that Lungo was not indebted to the plaintiff. The agreement before the notary, and reduced to writing by him, unequivocally admitted the indebtedness; and, so far as appears, there was no testimony showing, or tending to show, nor any testimony offered, that the plaintiff's claim was not made in good faith. We see no reason for changing our former conclusion.[1]

9 Cyc. 342 (97); W. P. 214 (23); 13 H. L. R. 148.

FOSTER *v.* METTS & CO.

55 MISSISSIPPI, 77.—1877.

Action upon promissory note. Defendants demurred; demurrer sustained. Error to the Circuit Court. Two hundred dollars belonging to the plaintiff in error, Foster, were stolen from the United States mail by a carrier employed by the defendants in error, Metts & Co., who were contractors for carrying the mail from Louisville to Artesia. At first, Metts & Co. denied any liability to Foster for the loss, but finally, upon consideration that Foster would wait a few months for payment, Metts & Co. gave to him their promissory note for the amount lost. The note not being paid at maturity, this action was brought upon it.

CAMPBELL, J. . . . In this case the money was stolen by the mail-carrier. As to that, he certainly was not the agent of the contractors for whom he was riding, and, if they were liable for his acts within the scope of his employment, they were not liable for his wilful

[1] "If he (a man) *bona fide* believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration. When such a person forbears to sue he gives up what he believes to be a right of action and the other party gets an advantage, and, instead of being annoyed with an action, he escapes from the vexations incident to it. . . . It would be another matter if a person made a claim which he knew to be unfounded, and, by a compromise, derived an advantage under it: in that case his conduct would be fraudulent."—Callisher v. Bischoffsheim, L. R., 5 Q. B. 449.

wrongs and crimes. McCoy v. McKowen, 26 Miss. 487; New Orleans, Jackson & Great Northern R. R. Co. v. Harrison, 48 Miss. 112; Foster v. Essex Bank, 17 Mass. 479; Wiggins v. Hathaway, 6 Barb. 632; Story on Ag., sec. 309.

As the defendants in error were not liable for the money "extracted" from the mail by the carrier, they did not make themselves liable by giving their promissory note for it. It is without consideration. The compromise of doubtful rights is a sufficient consideration for a promise to pay money, but compromise implies mutual concession. Here there was none on the part of the payee of the note. His forbearance to sue for what he could not recover at law or in equity was not a sufficient consideration for the note. Newell v. Fisher, 11 Smed. & M. 431; Sullivan v. Collins, 18 Iowa, 228; Palfrey v. Railroad Co., 4 Allen, 55; Allen v. Prater, 35 Ala. 169; Edwards v. Baugh, 11 Mee. & W. 641; Longridge v. Dorville, 5 Barn. & Ald. 117; 1 Pars. on Con. 440; Smith on Con. 157; 1 Add. on Con. 28, sec. 14; 1 Hill on Con. 266, sec. 20.

Judgment affirmed.[1]

9 Cyc. 340 (87); 340–342 (89–97); W. P. 214 (23); 15 H. L. R. 316; 12 H. L. R. 517 (Ames). Bennett, Forbearance to sue, 10 H. L. R. 113.

STRONG *v.* SHEFFIELD.

144 NEW YORK, 392.—1895.

Appeal from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 12th, 1892, which reversed a judgment in favor of defendant, entered upon a verdict, and also affirmed an order denying a motion for a new trial.

This was an action upon a promissory note.

ANDREWS, C. J. The contract between a maker or endorser of a promissory note and the payee forms no exception to the general rule that a promise, not supported by a consideration, is *nudum pactum*. The law governing commercial paper which precludes an inquiry into the consideration as against *bona fide* holders for value before maturity, has no application where the suit is between the original parties to the instrument. It is undisputed that the demand note upon which the action was brought was made by the husband of the defendant and endorsed by her at his request and delivered to the plaintiff, the payee, as security for an antecedent debt owing by the husband to the plaintiff. The debt of the husband was past due at

1 As to forbearance to sue upon an illegal, as distinguished from an unfounded, claim see Kennedy v. Welch, *post*, p. 448.

the time, and the only consideration for the wife's endorsement, which is or can be claimed, is that as part of the transaction there was an agreement by the plaintiff when the note was given to forbear the collection of the debt, or a request for forbearance, which was followed by forbearance for a period of about two years subsequent to the giving of the note. There is no doubt that an agreement by the creditor to forbear the collection of a debt presently due is a good consideration for an absolute or conditional promise of a third person to pay the debt, or for any obligation he may assume in respect thereto. Nor is it essential that the creditor should bind himself at the time to forbear collection or to give time. If he is requested by his debtor to extend the time, and a third person undertakes in consideration of forbearance being given to become liable as surety or otherwise, and the creditor does in fact forbear in reliance upon the undertaking, although he enters into no enforcible agreement to do so, his acquiescence in the request, and an actual forbearance in consequence thereof for a reasonable time, furnishes a good consideration for the collateral undertaking. In other words, a request followed by performance is sufficient, and mutual promises at the time are not essential, unless it was the understanding that the promisor was not to be bound, except on condition that the other party entered into an immediate and reciprocal obligation to do the thing requested. (Morton v. Burn, 7 A. & E. 19; Wilby v. Elgee, L. R., 10 C. P. 497; King v. Upton, 4 Maine, 387; Leake on Con., p. 54; Am. Lead. Cas., Vol. II., p. 96 *et seq.* and cases cited.) The general rule is clearly, and in the main accurately, stated in the note to Forth v. Stanton (1 Saund. 210, note b). The learned reporter says: "And in all cases of forbearance to sue, such forbearance must be either absolute or for a definite time, or for a reasonable time; forbearance for a little, or for some time, is not sufficient." The only qualification to be made is that in the absence of a specified time a reasonable time is held to be intended. (Oldershaw v. King, 2 H. & N. 517; Calkins v. Chandler, 36 Mich. 320.) The note in question did not in law extend the payment of the debt. It was payable on demand, and although being payable with interest it was in form consistent with an intention that payment should not be immediately demanded, yet there was nothing on its face to prevent an immediate suit on the note against the maker or to recover the original debt. (Merritt v. Todd, 23 N. Y. 28; Shutts v. Fingar, 100 N. Y. 539.)

In the present case the agreement made is not left to inference, nor was it a case of request to forbear, followed by forbearance, in pursuance of the request, without any promise on the part of the creditor at the time. The plaintiff testified that there was an express agreement on his part to the effect that he would not pay the

note away, nor put it in any bank for collection, but (using the words of the plaintiff) "I will hold it until such time as I want my money, I will make a demand on you for it." And again: "No, I will keep it until such time as I want it." Upon this alleged agreement the defendant endorsed the note. It would have been no violation of the plaintiff's promise if, immediately on receiving the note, he had commenced suit upon it. Such a suit would have been an assertion that he wanted the money and would have fulfilled the condition of forbearance. The debtor and the defendant, when they became parties to the note, may have had the hope or expectation that forbearance would follow, and there was forbearance in fact. But there was no agreement to forbear for a fixed time or for a reasonable time, but an agreement to forbear for such time as the plaintiff should elect. The consideration is to be tested by the agreement, and not by what was done under it. It was a case of mutual promises, and so intended. We think the evidence failed to disclose any consideration for the defendant's endorsement, and that the trial court erred in refusing so to rule.

The order of the General Term reversing the judgment should be affirmed, and judgment absolute directed for the defendant on the stipulation with costs in all courts.

All concur, except GRAY and BARTLETT, JJ., not voting, and HAIGHT, J., not sitting.

Ordered accordingly.[1]

9 Cyc. 343 (5-6); 344 (16); W. P. 49 (56); 50 (58); 213 (22).

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[1] "An agreement to withhold suit is a good consideration to support a promise to pay a debt although no fixed and definite time is expressly agreed upon. . . . The legal effect of such an agreement is to bind the creditor to withhold suit for a reasonable time."—Traders' Nat. Bank v. Parker, 130 N. Y. 415.

But in Manter v. Churchill, 127 Mass. 31, it was held that "Mere forbearance to sue is not a sufficient consideration for a promise to pay the debt of another. Mecorney v. Stanley, 8 Cush. 85. An agreement to forbear and actual forbearance under such agreement is a sufficient consideration. Robinson v. Gould, 11 Cush. 55. In this case, the presiding judge, although he finds there was forbearance to sue, and finds that the plaintiff was induced to forbear because of the request of the defendant, yet does not find that there was upon the part of the plaintiff any agreement to forbear. The plaintiff, therefore, was under no obligation, legal or moral, not to bring a suit; and he might at any moment have commenced an action against the mother of the defendant, without any cause for complaint on the part of the defendant that he had violated any promise or engagement to him; and although the forbearance was at the request of the defendant, and at his solicitation, still it is not found to have been by virtue of an agreement."

Compromise.

RUSSELL *v.* COOK.

3 HILL (N. Y.), 504.—1842.

Error to the Onondaga common pleas. Russell recovered judgment before a justice against Cook and Smith on a promissory note made by them, payable to Sanford B. Palmer or bearer, for $68.34, with interest, and bearing date April 4, 1836. The note fell due in July, 1837, and was transferred to the plaintiff after that time. The defendants insisted that the note was without consideration.

COWEN, J. The defendants below admitted the execution of the note; and the burthen of showing that it was without consideration lay on them. They accordingly proved that several years before suit was brought, they undertook with Palmer & Noble to transport from Manlius to Albany certain barley in which they (Palmer & Noble) had a special property, and which they were bound to see delivered at Albany to Taylor. The defendants were common carriers by their boat on the canal, which, owing to its accidentally striking a stone in the canal, of which the defendants could not be perfectly aware, was broken, sunk, and the water let in upon the barley, by which it was much injured. A dispute arose between the parties whether the defendants were liable, and this was compromised by Palmer & Noble agreeing to discount one half of their claim, and the defendants agreeing to pay the other. The half which fell upon the defendants was secured by several promissory notes, of which the note in question was one. The estimate of damages was deliberately and fairly made. Palmer & Noble were guilty of no fraud; the defendants were fully aware of all the facts; and there was no mistake in the case. This is the defense, as made out by the defendants' own testimony. The court below submitted to the jury whether the notes were made without consideration, and the jury found for the defendants.

I am of opinion that the court below erred in omitting to charge the jury that the plaintiff was entitled to recover. No one would think of denying, that at least the dispute between the parties was doubtful, and that probably the law was against the defendants on the facts disclosed by their evidence. It is enough, however, that it was doubtful, and that the notes were given in pursuance of an agreement to compromise, in no way impeached for want of fairness. To show that this is so, I shall do little more than refer to Chit. on Cont. 43, 44, ed. of 1842, and the notes, where cases are cited which refuse to open an agreement of this kind, under circumstances much stronger in favor of the defendant than exist here on the most liberal construction which the defense can pretend to claim. The case of

O'Keson v. Barclay (2 Pennsyl. R. 531) sustained a promissory note given on the settlement of a slander suit for words not actionable. In such cases it matters not on which side the right ultimately turns out to be. The court will not look behind the compromise. Taylor v. Patrick, 1 Bibb, 168; Fisher v. May's Heirs, 2 Id. 448. It is not necessary, however, in the present case to go farther than was done in Longridge v. Dorville, 5 Barn. & Ald. 117. There the ship Carolina Matilda had run foul of the ship Zenobia in the Thames, and the former was arrested and detained by process from the admiralty to secure the payment of the damage. The agents for the owners of the Carolina Matilda stipulated with the agents for the owner of the Zenobia that, on the latter relinquishing their claim on the Carolina Matilda, the damages should be paid on due proof of them, if they did not exceed £180. The proceedings in the admiralty being withdrawn, an action was brought on the promise. The Carolina Matilda had a regular Trinity-house pilot on board when the collision took place; and there was some doubt on the law, therefore, whether the owners were liable. Held, that the compromise being of a claim thus doubtful, the defendants were absolutely bound, without regard to the question of actual liability. Abbott, C. J., said, "The parties agree to put an end to all doubts on the law and the fact, on the defendants' engaging to pay a stipulated sum." "The parties agreed to waive all questions of law and fact." Indeed, such is the intent of every compromise; and the best interests of society require that such should be the effect.

I therefore prefer putting the case on that ground, though I feel very little doubt that the defendants were liable to Palmer & Noble for the whole damages, instead of the half for which they were let off.

Judgment reversed.[1]

9 Cyc. 345 (25); 25 L. R. A. (N. S.) 275; W. P. 214 (23); 12 H. L. R. 276.

[1] Grandin v. Grandin, 49 N. J. L. 508, 514 (1887): "The compromise of a disputed claim made *bona fide* is a good consideration for a promise, whether the claim be in suit, or litigation has not been actually commenced, even though it should ultimately appear that the claim was wholly unfounded—the detriment to the party consenting to a compromise, arising from the alteration in his position, forms the real consideration which gives validity to the promise. The only elements necessary to a valid agreement of compromise are the reality of the claim made and the *bona fides* of the compromise. Cook v. Wright, 1 B. & S. 559–570; Callisher v. Bischoffsheim, L. R. (5 Q. B.) 449; Ockford v. Barelli, 25 L. T. 504; Miles v. N. Z. &c. Est. Co., 32 Ch. Div. 267, 283, 291, 298."

MINEHAN *v.* HILL.

144 N. Y. APPELLATE DIVISION, 854.—1911.

HOUGHTON, J. Eliza Bagley and James, her husband, in 1902, executed mutual wills, each making the other sole devisee and legatee. James died in March, 1905, and Eliza became the owner of a farm and some personal property. The plaintiff was her cousin, and, after the death of her husband, Eliza proposed to make her home with the plaintiff. The plaintiff claims that, in consideration of providing a home and caring for her, Eliza agreed to make a will giving her all of her property at her death. Eliza spent a portion of her time at plaintiff's house, and certain things were done for her comfort and welfare for about a year, when she died.

Immediately on her death, the defendant, who was her only heir at law and next of kin, came to the plaintiff's house, and a conversation was had respecting a will and the disposition of the property of the deceased. The plaintiff says that the defendant asked her if Eliza had made a will, and that she told her she did not know, and that the defendant replied, if a will had been made, she knew the plaintiff would get everything, but, if there was no will, she, the defendant, would get it because she was the only heir at law, and that the defendant admitted Eliza had never liked her and never intended her to have any of her property, and that the defendant said: "It is between me and you, . . . and the best thing we can do is to go out and settle it between ourselves." Inquiry was made as to who the lawyer of the deceased had been, and they finally went to him and had him draw an agreement, under seal, which both signed and acknowledged, reciting that Eliza Bagley had died, and that the plaintiff was a cousin and the defendant a niece, and that it was unknown whether Eliza had died intestate, and providing as follows:

"Now, therefore, in consideration of the sum of one dollar, each to the other in hand paid, the receipt whereof is hereby acknowledged, it is mutually covenated and agreed, as follows: That the estate, real and personal, of said Eliza Bagley, deceased, shall be divided equally between the parties to this agreement, and if it shall be ascertained that said Eliza Bagley left a last will and testament giving, bequeathing or devising to one of the parties to this agreement more than to the other, then each will execute to the other such transfers, assignments, bills of sale, deeds and other legal instruments as shall be necessary to carry into effect this agreement; it being understood and agreed, that said Bertie Minehan shall receive one half of the estate, real and personal, of said Eliza Bagley, deceased, and said Mary E. Hill shall receive the remaining half of said estate, real and personal; but this agreement shall not be construed to make either of the parties hereto in any way liable for any part of the estate of said Eliza Bagley, deceased, real or personal, which shall be given or devised by her to other person or persons than the parties to this agreement."

The version of the defendant as to how this agreement came to be executed differs somewhat from that of the plaintiff, and she says that the plaintiff told her that Eliza did not intend that she, defendant, should have any of her property, and that the defendant asked if Eliza had made a will, and the plaintiff replied that she did not know whether there was one or not, but, if she had made one that she, plaintiff, would have all the property. Eliza had not made any other will than the one which was inoperative because of her husband's death prior to her own decease, and her property passed to the defendant as sole heir and next of kin, but the defendant refused to surrender any part of the property to the plaintiff. This action was brought to compel the defendant to turn over one-half the personal property to the plaintiff and to execute a deed of an undivided half of the real property and for a partition, and resulted in a dismissal of the complaint on the ground that the agreement above set forth was void because it was without consideration.

We are of opinion the contract was a valid one, and that upon the evidence adduced the learned trial court erroneously dismissed the plaintiff's complaint.

It is difficult to see why the agreement does not come within the principle laid down in Briggs v. Tillotson, 8 Johns. 304, and Coleman v. Eyre, 45 N. Y. 38, and Smith v. Smith, 36 Ga. 184, 91 Am. Dec. 761, and why it is not a valid one because the promise of the one made a good consideration for the promise of the other.

But it is unnecessary to place our decision upon this narrow ground because the extrinsic facts show that the agreement was one of compromise of conflicting claims. The plaintiff gave proof tending to show that Eliza Bagley had agreed to will her all of her property in consideration of giving her such board and care as she should desire during her lifetime, and that plaintiff had performed her part of the bargain. Whether such contract was sufficiently specific to warrant a decree of specific performance, or whether the plaintiff had simply a claim for the value of services performed, is unimportant.

It does not appear that the plaintiff explained to the defendant the contract which she claimed to have had with Eliza, but it is apparent that the defendant believed that plaintiff had some sort of claim, and realized that she had not been in the good graces of the deceased, and that, if there was any will, it was likely to be in the plaintiff's favor, and that she herself would be cut off with only a small portion of the property or none at all. The plaintiff very frankly stated that she did not know whether the deceased had made a will or not, and thereby fulfilled the bargain which she claimed had been made; but it is perfectly apparent that the plaintiff believed she had some claim to the property either through a will or through the bargain itself.

Such claim being a *bona fide* one, so far as consideration for the

compromise is concerned, it does not matter whether the claim was much or little, or for that matter good or bad. It is not necessary in order to uphold a compromise agreement based upon a surrender or composition or compromise of a claim, that the claim should be a valid one, or one that can be enforced at law. A promise made upon a settlement of disputes and to prevent litigation is made upon a good consideration, and the settlement of a doubtful claim will uphold a promise to pay a stipulated sum or do any other lawful act. White v. Hoyt, 73 N. Y. 505, 514. Courts from the earliest times have favored compromises of *bona fide* disputes, and have held agreements therefor to be founded upon good consideration irrespective of the validity of the claim which was compromised. Goilmere v. Battison, 1 Vernon, 48; Cann v. Cann, 1 Williams, 723; Penn v. Lord Baltimore, 1 Vesey Sr. Ch. 444; Russell v. Cook, 3 Hill, 504; Hogue v. Hogue, 1 Watts (Pa.) 163, 216, 26 Am. Dec. 52; Leach v. Forbes, 11 Gray (Mass.) 506, 71 Am. Dec. 732; Sears v. Grand Lodge A. O. U. W., 163 N. Y. 374, 57 N. E. 618, 50 L. R. A. 204. Judges have stated the rule in various language, all however to the same tenor. In Russell v. Cook, *supra,* Cowen, J. says:

"In such cases it matters not on which side the right ultimately turns out to be. The court will not look behind the compromise."

In speaking of a contract of compromise under a will contest Bigelow, J., in Leach v. Forbes, *supra,* says:

"As they (such contracts) contribute to the peace and harmony of families and to the prevention of litigation, they will be supported in equity without an inquiry into the adequacy of the consideration on which they are founded."

Gibson, C. J., in Hogue v. Hogue, *supra,* says:

"The compromise of a doubtful title when procured without such deceit as would vitiate any other contract concludes the parties, though ignorant of the extent of their rights."

And Bartlett, J., in Sears v. Grand Lodge A. O. U. W., *supra,* says:

"Compromises of disputed claims fairly entered into are final, and will be sustained by the courts without regard to the validity of the claims."

There is no proof that the plaintiff was guilty of any misrepresentation or deceived the defendant in any way. On the contrary, it appears that, although the defendant is now loath to perform the agreement, she was the one who was most anxious to enter into it. It is true that neither knew what her absolute rights were. The defendant knew, however, that, if there was a will giving the property to the plaintiff, she could get nothing, and the plaintiff realized that if there was no will the defendant would take all the property, subject to

whatever rights she might have under the agreement which she claimed to have made with the deceased. To avoid litigation and controversy, the parties, without fully realizing perhaps how commendable their action was, entered into an agreement for equal division no matter what the situation might be. On the death of Eliza, the title to the property was in the defendant as heir and next of kin if there was no will, and, if there was a will in plaintiff's favor, it was in her, and the parties were not dealing with a mere expectancy or concerning property in which neither had any interest.

The contract was not a wager as to whether or not the deceased had left a will in the plaintiff's favor, as the defendant insists.

Nor will the plaintiff retain her claim if the defendant shall transfer to her one-half the estate of the deceased, as the respondent fears. The effect of the agreement, if valid, is to wipe out the plaintiff's claim, whatever it may be. The complaint is framed in a twofold aspect, and asks if there should be no division of the property that the plaintiff's claim be enforced.

Such services as the plaintiff received and such board as she may have furnished did not necessarily belong to the plaintiff's husband as the defendant urges. The husband was present and heard the bargain and never has made and now makes no claim and it is fair to say that if any emancipation was necessary he must be deemed to have assented to his wife's doing business on her own account and retaining the fruits of her contract.

If we are right in our conclusion that the agreement was one of compromise, and that it was founded upon a sufficient consideration, it follows that the judgment must be reversed and a new trial granted, with costs to the appellant to abide the event. All concur.

GUNNING *v.* ROYAL.

59 MISSISSIPPI, 45.—1881.

For the purpose of carrying dirt from a hill which he was cutting down, the appellant hired a mare and cart from the appellee, who furnished an inexperienced negro boy for driver. While a fall was being made at one end of the work, the rule was for the cart to be loaded at the other. On one occasion the boy, although warned by a laborer of the appellant, drove to the wrong end where there was no dirt, but where the bank was ready to be caved, and while he was attempting to comply with another laborer's direction to turn the mare away, some earth accidentally fell, injuring the animal so that she was afterward killed. The appellee demanded $150 for his loss. The appellant denied liability, but after a long dispute and an ineffectual attempt at arbitration, gave his note for $66 in

settlement of the controversy. When sued he pleaded want of consideration, and a jury being waived, the Court gave judgment for the plaintiff.

CAMPBELL, J., delivered the opinion of the Court.

The facts disclosed by the evidence acquit Gunning of all blame with respect to the injury to the mare and cart he had hired of Royal. He was, therefore, not legally answerable to Royal for the loss he suffered, or any part of it, and the giving of his note in settlement of the *controversy* did not preclude him from showing that he was not legally liable for the payment of the sum promised. The existence of a dispute or controversy between parties is not a sufficient consideration to support a promise to pay money in settlement of it, where no valid demand for anything whatever exists in favor of the promisee. There must be a valid demand to some extent, or for something, to uphold a promise of this kind. Giving a note to settle a dispute or controversy does not impose any liability on the maker, if he gains nothing and the payee loses nothing by it. In such case it devolves on the maker of the note, when sued, to show the entire want of any consideration for his promise, and Gunning did so in this case. Foster v. Metts, 55 Miss. 77, and cases there cited; Boone v. Boone, 58 Miss. 820.

Reversed and remanded.

9 Cyc. 341 (91); W. P. 214 (23).

Gratuitous undertakings.

THORNE *v.* DEAS.

4 JOHNSON (N. Y.), 84.—1809.

This was an action on the case, for a *nonfeasance,* in not causing insurance to be made on a certain vessel, called the Sea Nymph, on a voyage from New York to Camden, in North Carolina.

The plaintiffs were copartners in trade, and joint owners of one moiety of a brig called the Sea Nymph, and the defendant was sole owner of the other moiety of the same vessel. The brig sailed in ballast, the 1st December, 1804, on a voyage to Camden, in North Carolina, with William Thorne, one of the plaintiffs, on board, and was to proceed from that place to Europe or the West Indies. The plaintiffs and defendant were interested in the voyage, in proportion to their respective interests in the vessel. On the day the vessel sailed, a conversation took place between William Thorne, one of the plaintiffs, and the defendant, relative to the insurance of the vessel, in which W. Thorne requested the defendant that insurance might be made; to which the defendant replied, "that he (Thorne) might make

himself perfectly easy on the subject, for that the same should be done." About ten days after the departure of the vessel on her voyage, the defendant said to Daniel Thorne, one of the plaintiffs, "Well, we have saved the insurance on the brig." D. Thorne asked, "How so? or whether the defendant had heard of her arrival?" To which the defendant answered, "No; but that, from the winds, he presumed that she had arrived, and that he had not yet effected any insurance." On this, D. Thorne expressed his surprise, and observed, "that he supposed that the insurance had been effected immediately, by the defendant, according to his promise, otherwise he would have had it done himself, and that, if the defendant would not have the insurance immediately made, he would have it effected." The defendant replied, that "he (D. Thorne) might make himself easy, for he would that day apply to the insurance offices, and have it done."

The vessel was wrecked on the 21st December, on the coast of North Carolina. No insurance had been effected. No abandonment was made to the defendant by the plaintiffs.

The defendant moved for a nonsuit on the ground that the promise was without consideration and void; and that, if the promise was binding, the plaintiffs could not recover, without a previous abandonment to the defendant. These points were reserved by the judge.

A verdict was taken for the plaintiffs, for one-half of the cost of the vessel, with interest, subject to the opinion of the court on the points reserved.

KENT, C. J., delivered the opinion of the court. The chief objection raised to the right of recovery in this case is the want of a consideration for the promise. The offer, on the part of the defendant, to cause insurance to be effected, was perfectly voluntary. Will, then, an action lie, when one party entrusts the performance of a business to another, who undertakes to do it gratuitously, and wholly omits to do it? If the party who makes this engagement enters upon the execution of the business, and does it amiss, through the want of due care, by which damage ensues to the other party, an action will lie for this *misfeasance*. But the defendant never entered upon the execution of his undertaking, and the action is brought for the *nonfeasance*. Sir William Jones, in his Essay on the Law of Bailments, considers this species of undertaking to be as extensively binding in the English law as the contract of *mandatum* in the Roman law; and that an action will lie for damage occasioned by the nonperformance of a promise to become a *mandatary*, though the promise be purely gratuitous. This treatise stands high with the profession, as a learned and classical performance, and I regret that, on this point, I find so much reason to question its accuracy. I have carefully examined all the authorities to which he refers. He has not produced a single adjudged case, but only some *dicta* (and those equivocal) from the Year Books,

in support of his opinion; and was it not for the weight which the authority of so respectable a name imposes, I should have supposed the question too well settled to admit of an argument.

A short review of the leading cases will show that, by the common law, a *mandatary,* or one who undertakes to do an act for another without reward, is not answerable for omitting to do the act, and is only responsible when he attempts to do it, and does it amiss. In other words, he is responsible for a *misfeasance,* but not for a *nonfeasance,* even though special damages are averred. Those who are conversant with the doctrine of *mandatum* in the civil law, and have perceived the equity which supports it and the good faith which it enforces, may, perhaps, feel a portion of regret that Sir William Jones was not successful in his attempt to engraft this doctrine, in all its extent, into the English law. I have no doubt of the perfect justice of the Roman rule, on the ground that good faith ought to be observed, because the employer, placing reliance upon that good faith in the mandatary, was thereby prevented from doing the act himself, or employing another to do it. This is the reason which is given in the Institutes for the rule: *Mandatum non suscipere cuilibet liberum est; susceptum autem consummandum est, aut quam primum renunciandum, ut per semetipsum aut per alium, eandem rem mandator exequatur.* Inst. lib. 3, 27, 11. But there are many rights of moral obligation which civil laws do not enforce, and are, therefore, left to the conscience of the individual, as rights of imperfect obligation; and the promise before us seems to have been so left by the common law, which we cannot alter, and which we are bound to pronounce.

The earliest case on this subject of Watton v. Brinth (Year Book, 2 Hen. IV. 3 b), in which it appears that the defendant promised to repair certain houses of the plaintiff, and had neglected to do it, to his damage. The plaintiff was nonsuited, because he had shown no covenant; and Brincheley said, that if the plaintiff had counted that the thing *had been commenced, and afterwards, by negligence, nothing done,* it had been otherwise. Here the court at once took the distinction between *nonfeasance* and *misfeasance.* No consideration was stated and the court required a covenant to bind the party.

In the next case, 11 Hen. IV. 33 a, an action was brought against a carpenter, stating that he had undertaken to build a house for the plaintiff within a certain time, and had not done it. The plaintiff was also nonsuited, because the undertaking was not binding without a specialty; but, says the case, *if he had undertaken to build the house, and had done it illy or negligently,* an action would have lain, without deed. Brooke (Action sur le Case, pl. 40) in citing the above case, says, that "it seems to be good law to this day; wherefore the action upon the case which shall be brought upon the assumption, must state that for such a sum of money to him paid, etc., and that in the

above case, it is assumed, that there was no sum of money, therefore it was a *nudum pactum.*"

The case of 3 Hen. VI. 36 b is one referred to, in the Essay on Bailments, as containing the opinion of some of the judges, that such an action as the present could be maintained. It was an action against Watkins, a mill-wright, for not building a mill according to promise. There was no decision upon the question, and in the long conversation between the counsel and the court, there was some difference of opinion on the point. The counsel for the defendant contended that a consideration ought to have been stated; and of the three judges who expressed any opinion, one concurred with the counsel for the defendant, and another (Babington, C. J.) was in favor of the action, but he said nothing expressly about the point of consideration, and the third (Cokain, J.) said, it appeared to him that the plaintiff had so declared, for it shall not be intended that the defendant would build the mill for nothing. So far is this case from giving countenance to the present action, that Brooke (Action sur le Case, pl. 7, and Contract, pl. 6) considered it as containing the opinion of the court, that the plaintiffs ought to have set forth what the miller was to have for his labor, for otherwise it was a *nude pact;* and in Coggs v. Bernard, Mr. Justice Gould gave the same exposition of the case.

The general question whether assumpsit would lie for a *nonfeasance* agitated the courts in a variety of cases afterwards, down to the time of Henry VII. 14 Hen. VI. 18 b, pl. 58; 19 Hen. VI. 49 a, pl. 5; 20 Hen. VI. 34 a, pl. 4; 2 Hen. VII. 11, pl. 9; 21 Hen. VII. 41 a, pl. 66. There was no dispute or doubt, but that an action upon the case lay for a *misfeasance* in the breach of a trust undertaken voluntarily. The point in controversy was, whether an action upon the case lay for a *nonfeasance,* or nonperformance of an agreement, and whether there was any remedy where the party had not secured himself by a covenant or specialty. But none of these cases, nor, as far as I can discover, do any of the *dicta* of the judges in them go so far as to say, that an assumpsit would lie for the non-performance of a promise, without stating a consideration for the promise. And when, at last, an action upon the case for the non-performance of an undertaking came to be established, the necessity of showing a consideration was explicitly avowed.

Sir William Jones says, that "a case in Brooke, made complete from the Year Book to which he refers, seems directly in point." The case referred to is 21 Hen. VII. 41, and it is given as a loose *note* of the reporter. The chief justice is there made to say, that if one agree with me to build a house by such a day, and he does not build it, I have an action on the case for this *nonfeasance,* equally as if he had done it amiss. Nothing is here said about a consideration; but in the next instance which the judge gives of a *nonfeasance* for which an

action on the case lies, he states a consideration paid. This case, however, is better reported in Keilway, 78, pl. 5, and this last report must have been overlooked by the author of the Essay. Frowicke, C. J., there says, "that if I covenant with a carpenter to build a house, and pay him 20*l.* to build the house by a certain day, and he does not do it, I have a good action upon the case, *by reason of the payment of my money; and without payment of the money in this case,* no remedy. And yet, if he make the house in a bad manner, an action upon the case lies; and so for the *nonfeasance, if the money be paid,* action upon the case lies."

There is, then, no just reason to infer, from the ancient authorities, that such a promise as the one before us is good, without showing a consideration. The whole current of the decisions runs the other way, and, from the time of Henry VII. to this time, the same law has been uniformly maintained.

The doctrine on this subject, in the Essay on Bailments, is true, in reference to the civil law, but is totally unfounded in reference to the English law; and to those who have attentively examined the head of *Mandates,* in that Essay, I hazard nothing in asserting that that part of the treatise appears to be hastily and loosely written. It does not discriminate well between the cases; it is not very profound in research, and is destitute of true legal precision.

But the counsel for the plaintiffs contended, that if the general rule of the common law was against the action, this was a commercial question, arising on a subject of insurance, as to which a different rule had been adopted. The case of Wilkinson v. Coverdale (1 Esp. Rep. 75) was upon a promise to cause a house to be insured, and Lord Kenyon held, that the defendant was answerable only upon the ground that he had proceeded to execute the trust, and had done it negligently. The distinction, therefore, if any exists, must be confined to cases of marine insurance. In Smith v. Lascelles (2 Term Rep. 188) Mr. Justice Buller said it was settled law, that there were three cases in which a merchant, in England, was bound to insure for his correspondent abroad.

1. Where the merchant abroad has effects in the hands of his correspondent in England, and he orders him to insure.

2. Where he has no effects, but, from the course of dealing between them, the one has been used to send orders for insurance, and the other to obey them.

3. Where the merchant abroad sends bills of lading to his correspondent in England, and engrafts on them an order to insure, as the implied condition of acceptance, and the other accepts.

The case itself, which gave rise to these observations, and the two cases referred to in the note to the report, were all instances of *misfeasance,* in proceeding to execute the trust, and in not executing it

well. But I shall not question the application of this rule, as stated by Buller, to cases of *nonfeasance,* for so it seems to have been applied in Webster v. De Tastet, 7 Term Rep. 157. They have, however, no application to the present case. The defendant here was not a factor or agent to the plaintiffs, within the purview of the law merchant. There is no color for such a suggestion. A factor, or commercial agent, is employed by merchants to transact business abroad, and for which he is entitled to a commission or allowance. Malyne, 81; Beawes, 44. In every instance given, of the responsibility of an agent for not insuring, the agent answered to the definition given of a factor, who transacted business for his principal, who was absent, or resided abroad; and there were special circumstances in each of these cases, from which the agent was to be charged; but none of those circumstances exist in this case. If the defendant had been a broker, whose business it was to procure insurances for others, upon a regular commission, the case might, possibly, have been different. I mean not to say, that a factor or commercial agent cannot exist, if he and his principal reside together at the same time, in the same place; but there is nothing here from which to infer that the defendant was a factor, unless it be the business he assumed to perform, viz., to procure the insurance of a vessel, and that fact alone will not make him a factor. Every person who undertakes to do any specific act, relating to any subject of a commercial nature, would equally become, *quoad hoc,* a factor; a proposition too extravagant to be maintained. It is very clear, from this case, that the defendant undertook to have the insurance effected, as a voluntary and gratuitous act, without the least idea of entitling himself to a commission for doing it. He had an equal interest in the vessel with the plaintiffs, and what he undertook to do was as much for his own benefit as theirs. It might as well be said, that whenever one partner promises his copartner to do any particular act for the common benefit, he becomes, in that instance, a factor to his copartner, and entitled to a commission. The plaintiffs have, then, failed in their attempt to bring this case within the range of the decisions, or within any principle which gives an action against a commercial agent, who neglects to insure for his correspondent. Upon the whole view of the case, therefore, we are of opinion that the defendant is entitled to judgment.

Judgment for the defendant.

9 Cyc. 310 (74); Beale, Gratuitous undertakings, 5 H. L. R. 222.

c. Third test of reality. Does the promisee do, forbear, suffer, or promise more than that to which he is legally bound?

Delivering property wrongfully withheld.

TOLHURST *v.* POWERS.

133 NEW YORK, 460.—1892.

Appeal from judgment of the General Term of the Supreme Court, which affirmed a judgment in favor of defendant, entered upon the report of a referee.

This action was brought to recover a balance of an account originally due plaintiffs from one Clinton M. Ball for services in the construction and fitting of a dynamo and other electrical appliances, which it was claimed defendant had agreed to pay.

FINCH, J. We agree with the prevailing opinion of the General Term that there was no consideration to support the promise of Powers to pay Ball's debt to the plaintiffs. The latter originally constructed a dynamo for which Ball became indebted to them, and after all payments he remained so indebted when the machine was ready for delivery. The builders, of course, had a lien upon it for the unpaid balance, but waived and lost their lien by a delivery to Ball without payment. He, being then the owner and holding the title free from any incumbrance, sold the dynamo to Crane on a contract apparently contingent upon the successful working of the machine. It did not work successfully and was sent back to the plaintiffs to be altered, with a view of correcting its imperfections. At this point occurred the first intervention of the defendant Powers. He had not then obtained, so far as the case shows, any interest in the machine, and the complete title was either in Crane or Ball, or in both; but when the plaintiffs hesitated about entering upon the new work until their charges for it should be made secure, Powers agreed to pay them. The true character of that promise is immaterial, for, when the work was done, Powers did pay according to his contract. Thereafter, Ball and Powers requiring a delivery of the dynamo, the plaintiffs undertook or threatened to retain the possession till the original debt should be paid. That they had no right to do. Their primary lien was lost by the delivery, and they acquired no new one by reason of the repairs which were paid for. Such refusal to surrender the possession was an absolute wrong without any color of right about it. After demand their refusal was a trespass, and according to their own evidence the sole consideration for the promise which they claim that Powers made to pay the old debt of Ball was their surrender of possession. To that they were already bound, and parted with nothing by the surrender. They gave up no right which they had against any one, but extorted

the promise by a threat of what would have been, if executed, a wrongful conversion. Doing what they were already bound to do furnished no consideration for the promise.

It is said, however, that Ball made no demand, and until he did, the plaintiffs were not bound to deliver the possession, and that the delivery was to Powers and not to Ball. But there was certainly a request to ship the machine and so part with the possession, and both the request and the shipment were with the concurrence of Ball. It was that very request that brought up the subject of the old debt, and Ball stood by, plainly assenting, at least by omitting any dissent or objection. The shipment to Powers by name made it none the less a delivery to Ball, whose concurrence is explicitly found. Surely, after what happened, the latter could not have maintained an action for conversion on the ground that there had been no delivery to him. The undisputed fact is that the plaintiffs were seeking to withhold a delivery to the owner without the least right of refusal. There was no harm to plaintiffs and no benefit conferred on Powers. The former parted with nothing of their own, and the latter gained nothing, for the shipment to him was a delivery to Ball, the owner, since made with his concurrence, and Powers obtained no right or interest in the property as the result of the delivery. He simply took it, if he took at all, which is doubtful, as the agent or bailee of the owner, and acquired no right in it until a later period. Until the mortgage made subsequently, his advances for repairs constituted only an unsecured debt against Ball. The turning point of the appellant's argument is the unwarranted assumption that the plaintiffs agreed to deliver, and did deliver the dynamo to one whom they knew not to be the owner without the assent of Ball, who was the owner, but who, nevertheless, stood by and made no objection. No fair construction of the evidence will sustain the appellant's theory.

The judgment should be affirmed, with costs. All concur.

Judgment affirmed.

9 Cyc. 347 (39–40).

Performance of public duty.

SMITH *v.* WHILDIN.

10 PENNSYLVANIA STATE, 39.—1848.

In error from the Common Pleas of Philadelphia.

Assumpsit on the common counts. The plaintiff, who was a constable in Philadelphia, proved that the defendant had offered him a reward of $100 for the arrest of one M. Crossin, against whom warrants had been issued on a charge for obtaining goods under false pretenses.

COULTER, J. There was no consideration for the promise, and the court below therefore misconceived the law. It is the duty of a constable to pursue, search for, and arrest offenders against whom criminal process is put into his hands. It is stated in Com. Digest (title Justice of the Peace, B. 79) that the duty of a constable requires him to do his utmost to discover, pursue, and arrest felons. The office of constable is created not for the private emolument of the holder, but to conserve the public peace, and to execute the criminal law of the country. He is not the agent or employee of the private prosecutor, but the minister of the law, doing the work of the public, which he is bound to do faithfully for the fee prescribed by law, to be paid as the law directs. And it would be against public policy as well as against law to hold otherwise.

There are things which a constable is not officially bound to do, such as to procure evidence, and the like, and for this he may perhaps be allowed to contract. And this is the full extent of the principle in the case cited from 11 Ad. and El. 856. But it has been held that even a sailor cannot recover for extra work on a promise by the master to pay for extra work in managing the ship in peril, the sailor being bound to do his utmost independently of any fresh contract. Stilk v. Myrick, 2 Camp. 317, and the cases there cited.

It would open a door to profligacy, chicanery, and corruption, if the officers appointed to carry out the criminal law were permitted to stipulate by private contract; it would open a door to the escape of offenders by culpable supineness and indifference on the part of those officers, and compel the injured persons to take upon themselves the burden of public prosecutions. It ought not to be permitted. Constables must do their utmost to discover, pursue, and arrest offenders within their township, district, or jurisdiction, without other fee or reward than that given by the law itself.

Judgment reversed, and a *venire de novo* awarded.[1]

9 Cyc. 348 (41–42); W. P. 205 (16); 11 C. L. R. 589.

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[1] In McCandless v. Alleghany Bessemer Steel Co., 152 Pa. St. 139, a sheriff recovered money expended by him for expense of deputies selected by him at request of defendants, for their special benefit, and upon the faith of their promise to make good the amount thus advanced.

In Reif v. Paige, 55 Wis. 496, defendant's wife was in a burning hotel and defendant said: "I will give $5,000 to any person who will bring the body of my wife out of that building, dead or alive." Plaintiff was a paid officer of the fire department. With a view to claiming the reward he rescued the body. In an action for the reward the court held: "that inasmuch as the plaintiff could not rescue the body of Mrs. Paige from the burning building without imminent peril of losing his own life, and inasmuch as it was not his duty as a paid officer and member of the Fire Department to do so, he is in a position to claim the reward alleged to have been offered by the defendant for such rescue."

Promise to perform existing contract.

COYNER *v.* LYNDE.

10 INDIANA, 282.—1858.

HANNA, J. The appellant was the plaintiff, and the appellees the defendants. The plaintiff was a contractor with the Richmond and Newcastle Railroad Company, for the construction of a portion of said road. The defendants undertook, and agreed with the plaintiff, to complete a portion of that contract, to wit, to grade the road, for which they were to receive from the company the same rates per yard, etc., that the plaintiff was to have received, and said defendants were to pay the plaintiff a certain portion of the sum so received, to wit, so much per yard, etc., as a premium, or for the privilege of said contract. This suit is for that sum, which was to have been thus paid by defendants to plaintiff.

The court overruled the demurrer to the sixth paragraph of the defendants' answer, and gave and refused certain instructions directed to the points involved in that paragraph. Of these rulings the plaintiff complains.

The sixth paragraph is, in substance, that after the plaintiff and defendants had entered into the agreement sued on, it was ascertained that the prices at which plaintiff had undertaken with the company to do the work were greatly inadequate; that it would be a losing business to prosecute the work; that upon such discovery, the defendants determined to abandon the contract, and leave the plaintiff to perform it; that the plaintiff, knowing he would suffer loss to complete the same himself at the prices, "in view of said facts, and to induce the defendants to go on with said work, and not throw the same on the hands of said plaintiff, he, said plaintiff, agreed that if said defendants would agree to continue to prosecute said work to final completion, and procure additional and extra pay from said company, which, with the amount agreed to be paid plaintiff, would enable them to complete said work, and save him from prosecuting the same, he, the said plaintiff, then and there agreed to release and acquit them from said payment," etc.; that relying on this promise, and an agreement of the company to pay them an additional compensation, they completed said work.

It is insisted by the plaintiff that there was not, nor is there alleged to be, any consideration for this new promise, and it was therefore void; whilst, by the defendants, it is argued that the contract was, in effect, abandoned, and the work afterwards resumed because of the new promise, and that such resumption of work was a sufficient con-

sideration for the new agreement to pay a different sum, to wit, the whole, instead of a part, of the original contract price.

Whether the contract between the plaintiff and the defendants was abandoned or not by the defendants, was a question to which the attention of the jury was fairly called by the instructions, and the law stated to them upon such a state of facts, if found. Under these circumstances, we cannot disturb their finding, especially as the whole evidence is not in the record. Mills v. Riley, 7 Ind. R. 138.

From the verdict of the jury, it is evident that they must have come to the conclusion that the contract had been abandoned. If it was abandoned, the plaintiff had his election, either to sue the defendants for non-performance, or to obtain the completion of the work by a new arrangement. If, in making such new arrangement or agreement, new or additional promises were made to the defendants dependent upon the completion of the work, and the defendants, in consideration of such promises, completed the work, we do not see anything to prevent such promises from being binding. Munroe v. Perkins, 9 Pick. 302; 14 Johns. 330. Such new agreement might embrace in its terms, and definitely or by legitimate implication dispose of, any right of action which the plaintiff had, under the previous contract, against the defendants for failure to perform, for portions of the sum due for work done, so far as it had progressed. 4 Ind. R. 75; 7 Id. 597. Whether a new agreement was made, and if so, whether the defendants were absolved thereby from the payment of the *bonus* previously agreed upon, were also questions of fact for the jury, and were, so far as we can see, properly submitted to them, and we cannot disturb their verdict thereon.

In the case cited in 14 Johns., the plaintiff undertook, by agreement under seal, to construct a certain cart-way for the sum of $900. After progressing with the work, he ascertained that the price was inadequate, and determined to abandon the contract; whereupon the defendant agreed verbally to release him from the contract and pay him by the day if he would complete the work, which he did; and in a suit for work and labor, the second contract was considered binding. So the case in 9 Pickering was for work and labor, etc., in the erection of a hotel. Defense, a special contract, etc. Reply, waiver of the contract, and new promise, etc. And although, so far as can be gathered from the opinion, the evidence of an abandonment of the original contract was not by any means strong, yet the verdict of the jury is adverted to as settling that question. See also 7 Ind. R. 138.

As the evidence is not in the record, the presumption which we have often decided would arise in reference to instructions given and refused, would prevent us from saying that the instructions given in this case were improper; and so, also, as to the ruling of the court in

refusing those that were asked. 9 Ind. R. 115; Id. 230; Id. 286; 8 Id. 502; 7 Id. 531.

Per Curiam. The judgment is affirmed with costs.[1]

9 Cyc. 351–352 (63, 64, 66–67); 34 L. R. A. 33; 30 L. R. A. (N. S.) 319; W. P. 203 (15); 15 H. L. R. 317; 7 C. L. R. 203 (ante-nuptial contracts); 5 Mich. L. R. 570; 57 Univ. of Pa. L. R. 404; Williston, Successive promises of the same performance, 8 H. L. R. 27; 12 H. L. R. 521 (Ames); 13 H. L. R. 37 (Ames).

ENDRISS *v.* BELLE ISLE ICE CO.

49 MICHIGAN, 279.—1882.

Assumpsit. Plaintiff brings error.

GRAVES, C. J. The ice company agreed with plaintiff, who is a brewer, to furnish him with the ice he would require for his brewery during the season of 1880 at $1.75 per ton, or in case of scarcity, $2 per ton. The parties proceeded under the contract until May, at which time the ice company refused further performance and so notified the plaintiff. Shortly afterwards the parties arranged that the ice company should furnish ice at $5 per ton; but this was soon modified by reducing the price to $4 per ton. This arrangement, it seems, was carried out. The plaintiff, however, brought this suit to recover damages for the breach of the original contract, and his contention was that when the ice company broke that contract the law made it his duty to use reasonable efforts to mitigate the damages, and hence to provide himself with ice on the best practicable terms, and without regard to the individuality of the party of whom it could or might be obtained, and that acting in accordance with that duty, he

[1] In Rogers v. Rogers, 139 Mass. 440, the court said: "Whether the new agreement was substituted for the old, and thus operated as a rescission or discharge of it, must be determined by the intention of the parties, to be ascertained from their correspondence and conduct. Munroe v. Perkins, 9 Pick. 298; Cummings v. Arnold, 3 Met. 486; Stearns v. Hall, 9 Cush. 31; Holmes v. Doane, 9 Cush. 135; Peck v. Requa, 13 Gray, 407; Lawrence v. Davey, 28 Vt. 264; Stewart v. Keteltas, 36 N. Y. 388; Cooke v. Murphy, 70 Ill. 96; Moore v. Detroit Locomotive Works, 14 Mich. 266. If we assume that the original agreement was sufficiently definite to constitute a valid contract, as it was a continuing contract, the parties could clearly substitute for it a new contract, which should determine their rights and liabilities after the new contract was made, and this would operate as a waiver or discharge of the first contract as to future orders and deliveries, unless it appeared that the first contract had been broken by an absolute refusal on the part of the defendant to perform it, and that the new contract was not intended to be a discharge of the breach. . . . Our construction of the correspondence and conduct of the parties is, that it was not understood or intended by both parties that the plaintiffs should retain their right of action, if they had any, for the alleged breach of the original contract."

made a new contract with the ice company, and one wholly distinct from that which the company refused to perform, at $4, and without waiving or impairing his right to hold the ice company for its violation of the original contract.

The ice company claimed, on the other hand, that the second arrangement was merely a modification by consent of the first, and that it left open no ground of action on account of the refusal of the company to perform the contract as it was originally made.

The trial judge was of opinion that the evidence was all one way, and that it afforded no room for argument in favor of the position of the plaintiff, and he ordered a verdict for the defendant. We are not able to concur in this view.

We think the circumstances raised a question for the jury, and that it should have been left to them to construe and weigh the evidence, and at length decide between the conflicting theories. Goebel v. Linn (47 Mich. 489) has no application. The suit there was on a note, and the question was on the existence of legal consideration, and whether the defense of duress was compatible with admitted facts.

The judgment should be reversed with costs and a new trial granted.

The other Justices concurred.[1]

9 Cyc. 352 (65); W. P. 203 (15).

LINGENFELDER *et al.* Executors *v.* WAINWRIGHT BREWING CO.

103 MISSOURI, 578.—1890.

Action from St. Louis City Circuit Court.

Action by the executors of Jungenfeld for services performed by him. Jungenfeld, an architect, was employed by defendants to plan and superintend the construction of brewery buildings. He was also president of the Empire Refrigerating Company, and largely interested

[1] In Rollins v. Marsh, 128 Mass. 116, the court said: "The parties had made a contract in writing with which the plaintiff had become dissatisfied, and which she had informed the defendant that she should not fulfil unless the terms were modified. If she had abandoned her contract, he might have made a new arrangement with some one else for the support of his ward, and enforced whatever remedy he had for the breach against the plaintiff. Instead of this, he made a new contract with her, which operated as a rescission of the original agreement. Meanwhile the plaintiff had continued in the performance of her original agreement, which was recognized by both parties as subsisting and binding, till it was rescinded by the making of the new one. The release of one from the stipulations of the original agreement is the consideration for the release of the other; and the mutual releases are the consideration for the new contract, and are sufficient to give it full legal effect. Cutter v. Cochrane, 116 Mass. 408."

therein. The De La Vergne Ice Machine Company was a competitor in business. Against Jungenfeld's wishes Wainwright awarded the contract for the refrigerating plant to the De La Vergne Company. The brewery was at that time in process of erection and most of the plans were made. When Jungenfeld heard that the contract was awarded, he took his plans, called off his superintendent on the ground, and notified Wainwright that he would have nothing more to do with the brewery. The defendants were in great haste to have their new brewery completed for divers reasons. It would be hard to find an architect in Jungenfeld's place, and the making of new plans and arrangements when another architect was found would involve much loss of time. *Under these circumstances* Wainwright promised to give Jungenfeld five per cent on the cost of the La Vergne ice machine if he would resume work. Jungenfeld accepted, and fulfilled the duties of superintending architect till the completion of the brewery.

GANTT, P. J. . . . Was there any consideration for the promise of Wainwright to pay Jungenfeld five per cent on the refrigerator plant? If there was not, plaintiff cannot recover the $3449.75, the amount of that commission. The report of the referee, and the evidence upon which it is based, alike show that Jungenfeld's claim to this extra compensation is based upon Wainwright's promise to pay him this sum to induce him, Jungenfeld, to complete his original contract under its original terms.

It is urged upon us by respondents that this was a new contract. New in what? Jungenfeld was bound by his contract to design and supervise this building. Under the new promise he was not to do anything more or anything different. What benefit was to accrue to Wainwright? He was to receive the same service from Jungenfeld under the new that Jungenfeld was bound to tender under the original contract. What loss, trouble, or inconvenience could result to Jungenfeld that he had not already assumed? No amount of metaphysical reasoning can change the plain fact that Jungenfeld took advantage of Wainwright's necessities, and extorted the promise of five per cent on the refrigerator plant, on the condition of his complying with his contract already entered into. Nor had he even the flimsy pretext that Wainwright had violated any of the conditions of the contract on his part.

Jungenfeld put it upon the simple proposition, that "if he, as an architect, put up the brewery, and another company put up the refrigerator machinery, it would be a detriment to the Empire Refrigerating Company," of which Jungenfeld was president. To permit plaintiff to recover under such circumstances would be to offer a premium upon bad faith, and invite men to violate their most sacred contracts, that they may profit by their own wrong.

"That a promise to pay a man for doing that which he is already under contract to do is without consideration," is conceded by respondents. The rule has been so long imbedded in the common law and decisions of the highest courts of the various States that nothing but the most cogent reasons ought to shake it. Harris v. Carter, 3 E. & B. 559; Stilk v. Myrick, 2 Camp. 317; 1 Chitty on Contracts (11 Amer. ed.), 60; Bartlett v. Wyman, 14 Johns. 260; Reynolds v. Nugent, 25 Ind. 328; Ayres v. Railroad, 52 Iowa, 478; Festerman v. Parker, 10 Ired. 474; Eblin v. Miller, 78 Ky. 371; Sherwin & Co. v. Brigham, 39 Ohio St. 137; Overdeer v. Wiley, 30 Ala. 709; Jones v. Miller, 12 Mo. 408; Kick v. Merry, 23 Mo. 72; Laidlou v. Hatch, 75 Ill. 11; Wimer v. Overseers of the Poor, 104 Penn. St. 317; Cobb v. Cowdery, 40 Vermont, 25; Vanderbilt v. Schreyer, 91 N. Y. 392.

But "it is carrying coals to New Castle" to add authorities on a proposition so universally accepted and so inherently just and right in itself. The learned counsel for respondents do not controvert the general proposition. Their contention is, and the Circuit Court agreed with them that, when Jungenfeld declined to go further on his contract, the defendant then had the right to sue for damages, and not having elected to sue Jungenfeld, but having acceded to his demand for the additional compensation, defendant cannot now be heard to say his promise is without consideration. While it is true Jungenfeld became liable in damages for the obvious breach of his contract, we do not think it follows that defendant is estopped from showing its promise was made without consideration.

It is true that as eminent a jurist as Judge Cooley, in Goebel v. Linn (47 Michigan, 489), held that an ice company which had agreed to furnish a brewery with all the ice they might need for their business from November 8, 1879, until January 1, 1881, at $1.75 per ton, and afterwards in May, 1880, declined to deliver any more ice unless the brewery would give it $3 per ton, could recover on a promissory note given for the increased price. Profound as is our respect for the distinguished judge who delivered that opinion, we are still of the opinion that his decision is not in accord with the almost universally accepted doctrine and is not convincing, and certainly so much of the opinion as holds that the payment by a debtor of a part of his debt then due would constitute a defense to a suit for the remainder is not the law of this State, nor do we think of any other where the common law prevails.

The case of Bishop v. Busse (69 Ill. 403) is readily distinguishable from the case at bar. The price of brick increased very considerably, and the owner changed the plan of the building so as to require nearly double the number; owing to the increased price and change in the plans, the contractor notified the party for whom he was building, that he could not complete the house at the original prices, and,

thereupon, a new arrangement was made, and it is expressly upheld by the court on the ground that the change in the buildings was such a modification as necessitated a new contract. Nothing we have said is intended as denying parties the right to modify their contracts, or make new contracts, upon new or different considerations and binding themselves thereby.

What we hold is that, when a party merely does what he has already obligated himself to do, he cannot demand an additional compensation therefor, and although by taking advantage of the necessities of his adversary he obtains a promise for more, the law will regard it as *nudum pactum,* and will not lend its process to aid in the wrong.

So holding, we reverse the judgment of the Circuit Court of St. Louis, to the extent that it allow the plaintiffs below, respondents here, the sum of $3449.75, the amount of commission at five per cent on the refrigerator plant; and, at the request of both sides, we proceed to enter the judgment here, which, in our opinion, the Circuit Court of St. Louis should have entered, and accordingly it is adjudged that the report of the referee be in all things approved, and that defendant have and recover of plaintiffs as executors of Edmund Jungenfeld the sum of $1492.17 so found by the referee with interest from March 9, 1887. All the judges of this division concur.[1]

9 Cyc. 349–350 (54–55); W. P. 203 (15).

KING *v.* DULUTH, M. N. RY. CO.

61 MINNESOTA, 482.—1895.

START, C. J. This is an action brought by the plaintiff, as surviving partner of the firm of Wolf & King, to recover a balance claimed to be due for the construction of a portion of the defendant's

[1] In Vanderbilt v. Schreyer, 91 N. Y. 392, the court held: "It being clear that Vanderbilt had no legal right to require, as a condition to the fulfilment of his contract, the performance of an act not required by the contract, it is difficult to see what benefit he has bestowed or what inconvenience he has suffered in return for the undertaking assumed by the defendant. He promises to do only that which he was before legally bound to perform. Even though it lay in his power to refuse to perform his contract, he could do this only upon paying the other party the damages occasioned by his non-performance, and that in contemplation of law would be equivalent to performance. He had no legal or moral right to refuse to perform the obligation of the contract into which he had upon a good consideration voluntarily entered. . . . It would doubtless be competent for parties to cancel an existing contract and make a new one to complete the same work at a different rate of compensation, but it seems that it would be essential to its validity that there should be a valid cancellation of the original contract. Such was the case of Lattimore v. Harsen (14 Johns. 330)."

line of railway. The complaint alleges two supposed causes of action, to each of which the defendant demurred on the ground that neither states facts constituting a cause of action. From an order overruling the demurrer the defendant appealed.

1. The complaint for a first cause of action alleges, among other things, substantially, that in January, 1893, the firm of Wolf & King entered into three written contracts with the president and representative of the defendant for the grading, clearing, grubbing, and construction of the roadbed of its railway for a certain stipulated price for each of the general items of work and labor to be performed; that the firm entered upon the performance of such contracts, but in the latter part of February, 1893, in the course of such performance, unforeseen difficulties of construction, involving unexpected expenses, and such as were not anticipated by the parties to the contracts, were encountered. That the firm of Wolf & King found that by reason of such difficulties it would be impossible to complete the contracts within the time agreed upon without employing an additional and an unusual force of men and means, and at a loss of not less than $40,000 to them, and consequently they notified the representative of the defendant that they would be unable to go forward with the contracts, and unable to complete or prosecute the work. Thereupon such representative entered into an agreement with them modifying the written contracts, whereby he agreed that if they would "go forward and prosecute the said work of construction, and complete said contract," he would pay or cause to be paid to them an additional consideration therefor, up to the full extent of the cost of the work, so that they should not be compelled to do the work at a loss to themselves; that in consideration of such promise they agreed to forward the work rapidly, and force the same to completion, in the manner provided in the specifications for such work, and referred to in such contracts. That in reliance upon the agreement modifying the former contracts, and in reliance upon such former contracts, they did prosecute and complete the work in accordance with the contracts as so modified by the oral agreement, to the satisfaction of all parties in interest. That such contracts and the oral contract modifying them were duly ratified by the defendant, and that the actual cost of such construction was not less than $30,000 in excess of the stipulated amount provided for in the original written contracts.

It is claimed by appellant that the complaint shows no consideration for the alleged promise to pay extra compensation for the work; that it is at best simply a promise to pay the contractors an additional compensation if they would do that which they were already legally bound to do. The general rule is that a promise of a party to a contract to do, or the doing of, that which he is already under a legal obligation to do by the terms of the contract is not a valid consideration to sup-

port the promise of the other party to pay an additional compensation for such performance. 1 Chit. Cont. 60; Pol. Cont. 176 (161); Leake, Cont. 621. In other words, a promise by one party to a subsisting contract to the opposite party to prevent a breach of the contract on his part is without consideration. The following cases sustain and illustrate the practical application of the rule. Ayres v. Railroad Co., 52 Iowa, 478, 3 N. W. 522; McCarty v. Association, 61 Iowa, 287, 16 N. W. 114; Lingenfelder v. Brewing Co., 103 Mo. 578, 15 S. W. 844; Vanderbilt v. Schreyer, 91 N. Y. 392; Reynolds v. Nugent, 25 Ind. 328; Robinson v. Jewett, 116 N. Y. 40, 22 N. E. 224; Wimer v. Worth Tp., 104 Pa. St. 317.

If the allegations of the complaint, when taken together, are in legal effect simply that the contractors, finding by the test of experience in the prosecution of the work that they had agreed to do that which involved a greater expenditure of money than they calculated upon, that they had made a losing contract, and thereupon notified the opposite party that they were unable to proceed with the work, and he promised them extra compensation if they would perform their contract, the case is within the rule stated, and the demurrer ought to have been sustained as to the first cause of action.

It is claimed, however, by the respondent, that such is not the proper construction of the complaint, and that its allegations bring the case within the rule adopted in several states, and at least approved in our own, to the effect that if one party to a contract refuses to perform his part of it unless promised some further pay or benefit than the contract provides, and such promise is made by the other party, it is supported by a valid consideration, for the making of the new promise shows a rescission of the original contract and the substitution of another. In other words, that the party, by refusing to perform his contract, thereby subjects himself to an action for damages, and the opposite party has his election to bring an action for the recovery of such damages or to accede to the demands of his adversary and make the promise; and if he does so it is a relinquishment of the original contract and the substitution of a new one. Monroe v. Perkins, 9 Pick. 305; Bryant v. Lord, 19 Minn. 396 (Gil. 342); Moore v. Locomotive Works, 14 Mich. 266; Goebel v. Linn, 47 Mich. 489, 11 N. W. 284; Rogers v. Rogers, 139 Mass. 440, 1 N. E. 122.

The doctrine of these cases as it is frequently applied does not commend itself either to our judgment or our sense of justice, for where the refusal to perform and the promise to pay extra compensation for performance of the contract are one transaction, and there are no exceptional circumstances making it equitable that an increased compensation should be demanded and paid, no amount of astute reasoning can change the plain fact that the party who refuses to perform, and thereby coerces a promise from the other party to the contract to pay

him an increased compensation for doing that which he is legally bound to do, takes an unjustifiable advantage of the necessities of the other party. To hold, under such circumstances, that the party making the promise for extra compensation is presumed to have voluntarily elected to relinquish and abandon all of his rights under the original contract, and to substitute therefor the new or modified agreement, is to wholly disregard the natural inference to be drawn from the transaction, and invite parties to repudiate their contract obligations whenever they can gain thereby.

There can be no legal presumption that such a transaction is a voluntary rescission or modification of the original contract, for the natural inference to be drawn from it is otherwise in the absence of any equitable considerations justifying the demand for extra pay. In such a case the obvious inference is that the party so refusing to perform his contract is seeking to take advantage of the necessities of the other party to force from him a promise to pay a further sum for that which he is already legally entitled to receive. Surely it would be a travesty on justice to hold that the party so making the promise for extra pay was estopped from asserting that the promise was without consideration. A party cannot lay the foundation of an estoppel by his own wrong. If it be conceded that by the new promise the party obtains that which he could not compel, viz., a specific performance of the contract by the other party, still the fact remains that the one party has obtained thereby only that which he was legally entitled to receive, and the other party has done only that which he was legally bound to do. How, then, can it be said that the legal rights or obligations of the party are changed by the new promise? It is entirely competent for the parties to a contract to modify or to waive their rights under it, and ingraft new terms upon it, and in such a case the promise of one party is the consideration for that of the other; but where the promise to the one is simply a repetition of a subsisting legal promise there can be no consideration for the promise of the other party, and there is no warrant for inferring that the parties have voluntarily rescinded or modified their contract.

But where the party refusing to complete his contract does so by reason of some unforeseen and substantial difficulties in the performance of the contract, which were not known or anticipated by the parties when the contract was entered into, and which cast upon him an additional burden not contemplated by the parties, and the opposite party promises him extra pay or benefits if he will complete his contract, and he so promises, the promise to pay is supported by a valid consideration. In such a case the natural inference arising from the transaction, if unmodified by any equitable considerations, is rebutted, and the presumption arises that by the voluntary and mutual promises of the parties their respective rights and obligations under the original

contract are waived, and those of the new or modified contract substituted for them. Cases of this character form an exception to the general rule that a promise to do that which a party is already legally bound to do is not a sufficient consideration to support a promise by the other party to the contract to give the former an additional compensation or benefit. 1 Whart. Cont. § 500.

On the other hand, where no unforeseen additional burdens have been cast upon a party refusing to perform his contract, which make his refusal to perform, unless promised further pay, equitable, and such refusal and promise of extra pay are all one transaction, the promise of further compensation is without consideration, and the case falls within the general rule, and the promise cannot be legally enforced, although the other party has completed his contract in reliance upon it. This proposition, in our opinion, is correct on principle and supported by the weight of authority. What unforeseen difficulties and burdens will make a party's refusal to go forward with his contract equitable, so as to take the case out of the general rule and bring it within the exception, must depend upon the facts of each particular case. They must be substantial, unforeseen, and not within the contemplation of the parties when the contract was made. They need not be such as would legally justify the party in his refusal to perform his contract, unless promised extra pay, or to justify a court of equity in relieving him from the contract; for they are sufficient if they are of such a character as to render the party's demand for extra pay manifestly fair, so as to rebut all inference that he is seeking to be relieved from an unsatisfactory contract, or to take advantage of the necessities of the opposite party to coerce from him a promise for further compensation. Inadequacy of the contract price which is the result of an error of judgment, and not of some excusable mistake of fact, is not sufficient.

The cases of Meech v. City of Buffalo (29 N. Y. 198), where the unforeseen difficulty in the execution of the contract was quicksand, in place of expected ordinary earth excavation, and Michaud v. MacGregor (61 Minn. 198), where the unforeseen obstacles were rocks below the surface of the lots to be excavated, which did not naturally belong there, but were placed there by a third party, and of the existence of which both parties to the contract were ignorant when the contract was made, are illustrations of what unforeseen difficulties will take a case out of the general rule.

Do the allegations of fact contained in plaintiff's first alleged cause of action bring his case within the exception? Clearly not; for eliminating all conclusions, and considering only the facts alleged, there is nothing to make the case exceptional, other than the general statement that the season was so extraordinary that in order to do the stipulated work it would require great and unusual expense, involving

a large use of powder and extra time and labor for the purpose of blasting out the frozen earth and other material which was encountered. What the character of this material was we are not told, or what the other extraordinary conditions of the ground were. The court will take judicial knowledge of the fact that frozen ground on the Missabe Range, where the work was to be performed, in the month of February, is not unusual or extraordinary. It was a matter which must have been anticipated by the parties, and taken into consideration by them when this contract was made. The most that can be claimed from the allegations of the complaint is that the contractors had made a losing bargain, and refused to complete their contract, and the defendant, by its representative, promised them that if they would go forward and complete their contract, it would pay them an additional compensation, so that the total compensation should be equal to the actual cost of the work.

2. The second cause of action is supported by a different and a valid consideration. It fairly appears from the allegations of the complaint as to this cause of action that the defendant, by changing its line and by its defaults, had so far delayed the work of construction as to legally excuse the contractors from their obligation to complete the work within the time originally agreed upon, and that to execute the work within such time would involve an additional expense. Thereupon, in consideration of their waiving the defaults and the delays occasioned by the defendant, and promising to complete the work in time, so that it could secure the bonds, it promised to pay or give to them the extra compensation. This was a legal consideration for such promise, and the allegations of the second general subdivision of the complaint state a cause of action.

So much of the order appealed from as overruled the defendant's demurrer to the supposed first cause of action in the plaintiff's complaint must be reversed, and as to so much of it as overruled the demurrer to the second cause of action it must be affirmed, and the case remanded to the district court of the county of St. Louis with the direction to modify the order appealed from so as to sustain the demurrer as to the first cause of action, with or without leave to the plaintiff to amend, as such court may deem to be just.

So ordered.

JOHNSON'S ADM'R *v.* SELLERS' ADM'R.

33 ALABAMA, 265.—1858.

Appeal from the Circuit Court of Wilcox.

Johnson contracted to teach school at Camden, the trustees of the school understanding that he also engaged to bring his wife with him

as a teacher. Johnson contended that he did not consider that he had made a contract to bring her. The evidence tended to show that thereafter Sellers [1] agreed to pay Johnson $2500 if he would bring Mrs. Johnson with him to teach at Camden.

WALKER, J. The counsel for the appellant only contends, that the first, fourth, ninth, and tenth charges given are erroneous; and we will, therefore, confine our attention to them. Upon the first charge it is not necessary that we should pass, as the question made upon it will not probably again arise.

(1.) The court erred in giving the fourth charge. The contracting parties are not bound beyond the stipulations of the contract. One of the parties is not bound to perform an act, not within the stipulations of the contract, because it was understood by the other party that he would perform it, and he knew of that understanding. The effect of the charge was, to hold Johnson bound to bring his wife with him, although he did not contract to do so, because it was known to him that the trustees understood that he was to bring her with him to teach in the school. In the giving of that charge the court erred. Sanford v. Howard, 29 Ala. 684.

(2.) The ninth and tenth charges assert the proposition, that if Johnson contracted to bring and associate his wife with him in teaching the school, and then refused to comply with that contract, a promise by Sellers to give him $2500, in order to induce him to comply, would be without consideration. In our judgment, these charges are correct. Johnson, by his contract, was legally bound to bring his wife to teach in the school, if the contract was such as the charge supposes. He had no *right* to violate that contract, and compensate the injured party in damages. It is true, the law would not interpose to compel the performance of the contract; but this is not because he had a right to violate his contract, but because the law supposes the injury done by the violation of it can be sufficiently compensated in damages. A man may commit a trespass, for which the law would merely give an action to recover damages; but it does not therefore follow, that he had a right to commit the trespass, being responsible for the damages, or that a promise made to induce him either to commit or not to commit it would be valid. Renfro v. Heard, 14 Ala. 23.

If two parties make a contract, one of them may waive the performance of the contract by the other, and assume some new and additional obligation as the consideration of the performance by the other. Such obligation would be binding. Within this principle fall the cases of Stoudenmeier v. Williamson, 29 Ala. 558; Munroe v. Perkins, 9 Pick. 298; and Lattimore v. Harsen, 14 Johns. 330; also, Spangler v. Springer, 22 Penn. St. R. 454; Whiteside v. Jennings, 19

[1] Sellers was one of the trustees of the school.

Ala. 784; Thomason v. Dill, 30 Ala. 444. Those cases rest upon the ground, that it is competent for the parties to a contract to modify or rescind it, or to waive their rights growing out of it as originally made, and engraft upon it new terms. Here, while there is a subsisting contract with the trustees, and a subsisting obligation to perform it, the proposition of the appellant is, that a promise by a third party to induce its performance, or rather to prevent its breach, was supported by a valid consideration. We do not think the law so regards such a promise.

We deem it proper to remark, that the testimony found in the bill of exceptions does not conclusively show whether Johnson's contract was to bring his wife to teach in the school with him; and that that question of fact should be left to the determination of the jury upon the evidence. The court could not assume that the resolution for the election of Johnson as principal on the 17th of August, 1850, contains all the terms of the contract. The question, what was the contract, must be left to the decision of the jury, upon that and the other evidence in the case.

The judgment of the court below is reversed, and the cause is remanded.

9 Cyc. 349 (54); 354 (73–75); W. P. 209 (19).

ABBOTT *v.* DOANE.

163 MASSACHUSETTS, 433.—1895.

Contract, upon a promissory note for $500. Defendant set up want of consideration. Verdict for plaintiff. Defendant alleged exceptions.

ALLEN, J. The plaintiff had given his accommodation note to a corporation, which had had it discounted at a bank, and left it unpaid at its maturity. The defendant being a stockholder, director, and creditor of the corporation, wishing to have the note paid at once for his own advantage, entered into an agreement with the plaintiff, whereby he was to give to the plaintiff his own note for the amount, and the plaintiff was to furnish money to enable the defendant to take up the note at the bank. This agreement was carried out, and the defendant now contends that his note to the plaintiff was without consideration, because the plaintiff was already bound in law to take up the note at the bank.

It is possible that, for one reason or another, both the bank and the plaintiff may have been willing to wait awhile, but that the defendant's interests were imperiled by a delay, and indeed required that the note should be paid at once, and that the corporation whose duty it was

primarily to pay it was without present means to do so. Since the defendant was sane, *sui juris,* was not imposed upon, nor under duress, knew what he was about, and probably acted for his own advantage, it would certainly be unfortunate if the rules of law required us to hold his note invalid for want of a sufficient consideration, when he has had all the benefit that he expected to get from it.

In this commonwealth, it was long ago decided that even between the original parties to a building contract, if, after having done a part of the work, the builder refused to proceed, but afterwards, on being promised more pay by the owner, went on and finished the building, he might recover the whole sum so promised. Munroe v. Perkins, 9 Pick. 298. See, also, Holmes v. Doane, 9 Cush. 135; Peck v. Requa, 13 Gray, 407; Rogers v. Rogers, 139 Mass. 440; Hastings v. Lovejoy, 140 Mass. 261, 265; Thomas v. Barnes, 156 Mass. 581. In other States there is a difference of judicial opinion, but the following cases sanction a similar doctrine: Lattimore v. Harsen, 14 Johns. 330; Stewart v. Keteltas, 36 N. Y. 388; Lawrence v. Davey, 28 Vt. 264; Osborne v. O'Reilly, 42 N. J. Eq. 467; Goebel v. Linn, 47 Mich. 489; Cooke v. Murphy, 70 Ill. 96. In England and in others of the United States a different rule prevails.

But when one, who is unwilling or hesitating to go on and perform a contract which proves a hard one for him, is requested to do so by a third person, who is interested in such performance, though having no legal way of compelling it or of recovering damages for a breach, and who accordingly makes an independent promise to pay a sum of money for such performance, the reasons for holding him bound to such payment are stronger than where an additional sum is promised by the party to the original contract.

Take an illustration. A enters into a contract with B to do something. It may be to pay money, to render service, or to sell land or goods for a price. The contract may be not especially for the benefit of B, but rather for the benefit of others, as *e. g.* to erect a monument, an archway, a memorial of some kind, or to paint a picture to be placed where it can be seen by the public. The consideration moving from B may be executed or executory. It may be money or anything else in law deemed valuable. It may be of slight value, as compared with what A has contracted to do. Now A is legally bound only to B, and, if he breaks his contract, nobody but B can recover damages, and those damages may be slight. They may even be already liquidated at a small sum by the terms of the contract itself. Though A is legally bound, the motive to perform the contract may be slight. If after A has refused to go on with his undertaking, or while he is hesitating whether to perform it or submit to such damages as B may be entitled to recover, other persons interested in having the contract performed intervene, and enter into a new agreement with A, by

which A agrees to do that which he was already bound by his contract with B to do, and they agree jointly or severally to pay him a certain sum of money, and give their note or notes therefor, and A accordingly does what he had before agreed to do, but what perhaps he might not otherwise have done, no good reason is perceived why they should not be held to fulfill their promise. They have got what they bargained for, and A has done what otherwise he might not have done, and what they could not have compelled him to do.

This has been so held in England, and the view is supported by English text writers, though not always for precisely the same reasons. Scotson v. Pegg, 6 Hurl. & N. 295; Shadwell v. Shadwell, 30 Law J. C. P. 145; Pol. Cont. (6th. ed.) 175, 177; Anson, Cont. (4th ed.) 87, 88; Leake, Cont. (3d ed.) 540. In this country the courts of several States have taken the opposite view, though in some instances the cases referred to as so holding, when examined, do not necessarily lead to that result. These cases are collected in the defendant's brief [1] and in Williston's discussion of the subject in 8 Harv. Law Rev. 27.

Without further dwelling on the reasons for the doctrine, it seems to us better to hold, as a general rule, that if A has refused or hesitated to perform an agreement with B, and is requested to do so by C, who will derive a benefit from such performance, and who promises to pay him a certain sum therefor, and A thereupon undertakes to do it, the performance by A of his agreement, in consequence of such request and promise by C, is a good consideration to support C's promise.

Exceptions overruled.[2]

9 Cyc. 354 (73-75); W. P. 209 (19); 12 H. L. R. 519 (Ames); 13 H. L. R. 29 (Ames).

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[1] The American cases cited by the defendant are Richardson v. Williams, 49 Me. 558; Putnam v. Woodbury, 68 Me. 58; Ellison v. Jackson Water Co., 12 Cal. 542; Ritenour v. Mathews, 42 Ind. 7; Gordon v. Gordon, 56 N. H. 170; Havana Press Drill Co. v. Ashurst, 148 Ill. 115; In re Godard's Estate, 29 Atl. Rep. 634; Baker v. Wahrmund, 5 Tex. Civ. App. 268; Ford v. Garner, 15 Ind. 298; Reynolds v. Nugent, 25 Ind. 328; Brownlee v. Rowe, 117 Ind. 420; Newton v. Chicago &c. Ry., 66 Iowa, 422; Vanderbilt v. Schreyer, 91 N. Y. 392; Seybolt v. New York &c. R., 95 N. Y. 562; Robinson v. Jewett, 116 N. Y. 40; Sherwin v. Brigham, 39 Oh. St. 137; Wimer v. Worth Township, 104 Penn. St. 317; Johnson v. Sellers, 33 Ala. 265; Schuler v. Myton, 48 Kans. 282; L'Amoreux v. Gould, 7 N. Y. 349; Merrick v. Giddings, 1 Mackey, 394; Davenport v. First Cong. Soc., 33 Wis. 387.

[2] In Arend v. Smith, 151 N. Y. 502, the defendant owed a corporation $1000 and the plaintiff (president of the corporation) told him that if he would give his note for the amount he (plaintiff) would indorse it and would renew it when it fell due. The note was given to plaintiff, who discounted it and turned the proceeds over to the corporation. When it fell due plaintiff could

Extension of debt.

KELLOGG *v.* OLMSTEAD, *et al.*

25 NEW YORK, 189.—1862.

Action on a note for six hundred dollars, made by the defendants and one John I. McPherson, since deceased, dated October 1, 1855, payable one year after date, with interest semi-annually, to one George R. D. Covil or bearer.

The answer set up as a defense, that on the 8th day of October, 1856, and after the note became due, and while Covil was the holder of the note, it was mutually agreed between Covil and the defendants, "that in consideration that the defendants would keep the principal sum of the said note until the 1st day of April, 1857, and pay the same with interest on that day, he, the said Covil, would extend the time of payment of the principal of said note until the 1st day of April, 1857; that the said defendants then and there assented to said proposition, and then and there agreed to and with said Covil, to keep said principal sum of said note until the first day of April, 1857, and to pay the same with interest on that day"; and that the note was transferred to the plaintiff by Covil, after the agreement so made by him with the defendants; and the plaintiff took the note with full knowledge thereof.

SUTHERLAND, J. I cannot avoid thinking that this case presents an ingenious attempt on the part of the appellants, to avoid the application of the well settled principle, that an agreement by a creditor to postpone the payment of a debt due, until a future day certain, in consideration of no other or further consideration than the agreement of the debtor to pay the debt with interest on that day, is void for want of consideration.

It has been decided over and over again, if the creditor whose debt is due, receives part payment of it, and in consideration of such payment, promises to postpone or extend the time of payment of the balance, that such promise is void for want of consideration. (Miller v. Holbrook, 1 Wend. 317; Gibson v. Renne, 19 id. 390; Pabodie v.

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not renew it, but took it up and brought action against defendant upon it. Defendant sets up the breach of the promise to renew. *Held*, that the promiss was without consideration since plaintiff was under a legal obligation to pay the corporation. "Although the promise in this case was made to induce performance, as the act performed was less than the legal duty already resting upon the defendant, it was incapable of sustaining an action or maintaining a defense."

The court seems not to have considered whether the act performed was not different from the legal duty already resting upon defendant. He was under an obligation to pay the corporation, but he was under no obligation to give a negotiable promissory note to plaintiff, or to the corporation.

King, 12 John. 426; Reynolds v. Ward, 5 Wend. 501; Fulton v. Mathews & Wedge, 15 John. 433.)

These cases certainly assume, that a promise by a creditor, no part of whose debt is paid, to extend the time of payment of the whole debt to a future day certain, in consideration of the promise of the debtor to pay the debt with interest on that day, would be void.

A creditor promising to extend the time of payment until a certain day would, not expect or ask his debtor to make a formal express promise in consideration of such extension, to pay his debt on that day, and not before that day; nor would the debtor, relying on such promise of extension, be very apt to make any such formal express promise; but if the promise of extension on the part of the creditor were held valid, such a promise on the part of the debtor would necessarily be implied. It would be implied from his acceptance of and reliance on the promise of the creditor. No court would ever hold the promise on the part of the creditor valid and binding without holding that there was a corresponding obligation on the part of the debtor to pay at the time fixed by the promise of extension, and not to pay before; that is, in the language of the defendant's answer, to keep the money until the day fixed by the promise of extension. Hence the cases before cited necessarily assume, that the agreement, or mutual agreements, specially set up in the defendant's answer would be *nudum pactum* and void, and would not have been a defence if proved; for these cases must have been decided on the assumption, if the promise on the part of the creditor to extend the time of payment was valid, or should be held valid, that there was or would be a corresponding valid obligation or promise on the part of the debtor not only to pay at the time fixed by the agreement of extension, but also not to pay before. These cases then, in effect, decide, if a creditor whose debt is due, in consideration of the payment of a part of it, and of a promise on the part of his debtor to pay the balance on a certain future day, and not before, promises to extend the time of payment of such balance until that day, that such promise is without consideration and void.

In this case, the defendants paid no part of the debt. The sole alleged consideration of the plaintiff's promise to extend the time of payment of the whole debt, until the 1st of April, 1857, was a promise on the part of the defendants, to pay the debt with interest on that day, and not before that day. The promise on the part of the defendants is not stated in the answer, in these precise words, but is substantially this.

But upon principle, and without reference to cases, the counsel for the appellants concedes, that their promise to pay interest was no consideration for Covil to delay payment, because, if Covil had delayed payment without such promise, he would have been entitled to

such interest; but he insists that their promise not to pay the principal until the 1st of April, and then to pay it, was a sufficient consideration for the promise of delay on the part of Covil, because it deprived them of the right to pay the money at any time, and secured to Covil the right to compel the defendants to keep the money until the 1st of April. This, I think, is fanciful. The appellants were to pay only legal interest for the use of the money. The rate of interest, or value of the use of money, being fixed by law, the law cannot hold the delay of payment to be either a disadvantage to the debtor, or an advantage to the creditor; the one paying, and the other receiving the legal rate of interest for the use of the money only. The law cannot hold it to be a disadvantage to a man, to agree to keep the money of another for a time certain, for the use of which he is only to pay the rate of interest fixed by law.

My conclusion is, that the judgment of the Supreme Court should be affirmed, with costs.[1]

WRIGHT, GOULD, ALLEN and SMITH, JJ., concurred.

DAVIES, J. and DENIO, Ch. J., dissented.

W. P. 205 (17); 13 H. L. R. 603.

Payment of smaller sum in satisfaction of larger.

JAFFRAY *v.* DAVIS.

124 NEW YORK, 164.—1891.

POTTER, J. The facts found by the trial court in this case were agreed upon. They are simple and present a familiar question of law. The facts are that defendants were owing plaintiffs on the 8th day of December, 1886, for goods sold between that date and the May previous at an agreed price, the sum of $7714.37, and that on

[1] See Veerhoff v. Miller, 30 App. Div. (N. Y.) 355, where it was held the promise to extend the time of payment might, in some cases, be enforced on the ground of estoppel.

And in McComb v. Kittridge, 14 Ohio, 348, the court held: "If the lender of money, secured by a note, after the same becomes due, contracts with the borrower that the time of paying the same shall be extended for one year, or for any other period, upon consideration that the borrower shall pay the legal or less rate of interest, why is not that a binding contract? The lender, by this contract, secures to himself the interest on his money for the year; and the borrower precludes himself from getting rid of the payment of the interest by discharging the principal. It is a valuable right to have money placed at interest, and it is a valuable right to have the privilege, at any time, of getting rid of the payment of interest, by discharging the principal. By this contract, the right to interest is secured for a given period, and the right to pay off the principal, and get rid of paying the interest, is also relinquished for such period. Here, then, are all the elements of a binding contract."

the 27th of the same December, the defendants delivered to the plaintiffs their three promissory notes, amounting in the aggregate to three thousand four hundred and sixty-two twenty-four one-hundredths dollars secured by *a chattel mortgage on* the stock, fixtures, and other property of defendants, located in East Saginaw, Michigan, which said notes and chattel mortgage were received by plaintiffs under an agreement to accept same in full satisfaction and discharge of said indebtedness. "That said notes have all been paid and said mortgage discharged of record."

The question of law arising from these facts and presented to this court for its determination is whether such agreement, with full performance, constitutes a bar to this action, which was brought after such performance to recover the balance of such indebtedness over the sum so secured and paid.

One of the elements embraced in the question presented upon this appeal is, viz., whether the payment of a sum less than the amount of a liquidated debt under an agreement to accept the same in satisfaction of such debt forms a bar to the recovery of the balance of the debt. This single question was presented to the English court in 1602, when it was resolved (if not decided) in Pinnel's case (5th Co. R. 117) "that payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole," and that this is so, although it was agreed that such payment should satisfy the whole. This simple question has since arisen in the English courts and in the courts of this country in almost numberless instances, and has received the same solution, notwithstanding the courts, while so ruling, have rarely failed, upon any recurrence of the question, to criticise and condemn its reasonableness, justice, fairness, or honesty. No respectable authority that I have been able to find has, after such unanimous disapproval by all the courts, held otherwise than as held in Pinnel's case, *supra,* and Cumber v. Wane, 1 Str. 426. Foakes v. Beer, L. R. 9 App. Cas. 605; 36 English Reports, 194; Goddard v. O'Brien, L. R. 9 Q. B. Div. 37; Vol. 21, Am. Law Register, 637, and notes.

The steadfast adhesion to this doctrine by the *courts* in spite of the current of condemnation by the individual judges *of the court,* and in the face of the demands and conveniences of a much greater business and more extensive mercantile dealings and operations, demonstrates the force of the doctrine of *stare decisis.* But the doctrine of *stare decisis* is further illustrated by the course of judicial decisions upon this subject; for while the courts still hold to the doctrine of the Pinnel and Cumber v. Wane cases, *supra,* they have seemed to seize with avidity upon any consideration to support the agreement to accept the lesser sum in satisfaction of the larger, or in other words, to extract if possible from the circumstances of each

case a consideration for the new agreement, and to substitute the new agreement in place of the old, and thus to form a defense to the action brought upon the old agreement. It will serve the purpose of illustrating the adhesion of the court to settled law and at the same time enable us perhaps more satisfactorily to decide whether there was a good consideration to support the agreement in this case, to refer to the consideration, in a few of the numerous cases, which the courts have held to be sufficient to support the new agreement.

Lord Blackburn said in his opinion in Foakes v. Beer, *supra,* and while maintaining the doctrine, "that a lesser sum cannot be a satisfaction of a greater sum," "but the gift of a horse, hawk or robe, etc., in satisfaction is good," quite regardless of the amount of the debt. And it was further said by him in the same opinion, "that payment and acceptance of a parcel before the day of payment of a larger sum would be a good satisfaction in regard to the circumstance of time," "and so if I am bound in twenty pounds to pay you ten pounds at Westminster, and you request me to pay you five pounds at the day at York, and you will accept it in full satisfaction for the whole ten pounds, it is a good satisfaction." It was held in Goddard v. O'Brien (L. R. 9 Q. B. Div. 37; 21 Am. L. Reg. N. S. 637): "A, being indebted to B in 125 pounds 7*s.* & 9*d.* for goods sold and delivered, gave B a check (negotiable, I suppose) for 100 pounds payable on demand, which B accepted in satisfaction, was a good satisfaction." Huddleston, B., in Goddard v. O'Brien, *supra,* approved the language of the opinion in Sibree v. Tripp (15 M. & W. 26), "that a negotiable security may operate, if so given and taken, in satisfaction of a debt of a greater amount; the circumstance of negotiability making it in fact a different thing and more advantageous than the original debt which was not negotiable."

It was held in Bull v. Bull (43 Conn. 455), "and although the claim is a money demand liquidated and not doubtful, and it cannot be satisfied with a smaller sum of money, yet if any other personal property is received in satisfaction, it will be good no matter what the value."

And it was held in Cumber v. Wane, *supra,* that a creditor can never bind himself by simple agreement to accept a smaller sum in lieu of an ascertained debt of a larger amount, such agreement being *nudum pactum,* but if there be any benefit or even any legal possibility of benefit to the creditor thrown in, that additional weight will turn the scale and render the consideration sufficient to support the agreement.

It was held in Le Page v. McCrea (1 Wend. 164) and in Boyd v. Hitchcock (20 Johns. 76) that "giving further security for part of a debt or other security, though for a less sum than the debt, and ac-

ceptance of it in full of all demands, make a valid accord and satisfaction."

That "if a debtor gives his creditor a note indorsed by a third party for a less sum that the debt (no matter how much less), but in full satisfaction of the debt, and it is received as such, the transaction constitutes a good accord and satisfaction." Varney v. Conery, 3 East R. 25. And so it has been held, "where by mode or time of part payment, different than that provided for in the contract, a new benefit is or may be conferred or a burden imposed, a new consideration arises out of the transaction and gives validity to the agreement of the creditor" (Rose v. Hall, 26 Conn. 392), and so "payment of less than the whole debt, if made before it is due or at a different place from that stipulated, if received in full, is a good satisfaction." Jones v. Bullitt, 2 Lit. 49; Ricketts v. Hall, 2 Bush. 249; Smith v. Brown, 3 Hawks. (N. C.) 580; Jones v. Perkins, 29 Miss. 139; Schweider v. Lang, 29 Minn. 254; 43 Am. R. 202.

In Watson v. Elliott (57 N. H. 511–513) it was held, "it is enough that something substantial, which one party is not bound by law to do, is done by him or something which he has a right to do he abstains from doing at the request of the other party," [and this] is held a good satisfaction.

It has been held in a number of cases that if a note be surrendered (by the payee to the maker), the whole claim is discharged and no action can afterwards be maintained on such instrument for the unpaid balance. Ellsworth v. Fogg, 35 Vt. 355; Kent v. Reynolds, 8 Hun, 559.

It has been held that a partial payment made to another, though at the creditor's instance and request, is a good discharge of the whole debt. Harper v. Graham, 20 Ohio, 106. "The reason of the rule is that the debtor in such case has done something more than he was originally bound to do, or at least something different. It may be more or it may be less, as a matter of fact."

It was held by the Supreme Court of Pennsylvania in Mechanics' Bank v. Huston (Feb. 13, 1882, 11 W. Notes of Cases, 389), the decided advantage which a creditor acquires by the receipt of a negotiable note for a part of his debt, by the increased facilities of recovering upon it, the presumption of a consideration for it, the ease of disposing of it in market, etc., was held to furnish ample reason why it should be a valid discharge of a larger account or open claim unnegotiable.

It has been held that a payment in advance of the time, if agreed to, is full satisfaction for a larger claim not yet due. Brooks v. White, 2 Met. 283; Bowker v. Childs, 3 Allen, 434.

In some States, notably Maine and Georgia, the legislature, in

order to avoid the harshness of the rule under consideration, have by statute changed the law upon that subject by providing, "no action can be maintained upon a demand which has been cancelled by the receipt of any sum of money less than the amount legally due thereon, or for any good and valuable consideration however small." Citing Weymouth v. Babcock, 42 Maine, 42.

And so in Gray v. Barton (55 N. Y. 68), where a debt of $820 upon book account was satisfied by the payment of $1 by calling the balance a gift,—though the balance was not delivered except by fiction, and the receipt was in the usual form and was silent upon the subject of a gift; and this case was followed and referred to in Ferry v. Stephens, 66 N. Y. 321.

So it was held in Mitchell v. Wheaton (46 Conn. 315; 33 Am. R. 24) that the debtor's agreement to pay and the payment of $150 with the costs of the suit upon a liquidated debt of $299 satisfied the principal debt.

These cases show in a striking manner the extreme ingenuity and assiduity which the courts have exercised to avoid the operation of the "rigid and rather unreasonable rule of the old law," as it is characterized in Johnston v. Brannan (5 Johns. 268–272), or as it is called in Kellogg v. Richards (14 Wend. 116), "technical and not very well supported by reason," or as may be more practically stated, a rule that "a bar of gold worth $100 will discharge a debt of $500, while 400 gold dollars in current coin will not." See note to Goddard v. O'Brien, *supra,* in Am. Law Register, New Series, Vol. 21, pp. 640, 641.

The state of the law upon this subject, under the modification of later decisions both in England and in this country, would seem to be as expressed in Goddard v. O'Brien (Queen's Bench Division, *supra*): "The doctrine in Cumber v. Wane is no doubt very much qualified by Sibree v. Tripp, and I cannot find it better stated than in 1st Smith's Leading Cases (7th ed.), 595, 'The general doctrine in Cumber v. Wane, and the reason of all the exceptions and distinctions which have been engrafted on it, may perhaps be summed up as follows, viz.: That a creditor cannot bind himself by a simple agreement to accept a smaller sum in lieu of an ascertained debt of larger amount, such an agreement being *nudum pactum.* But if there be any benefit or even any legal possibility of benefit to the creditor thrown in, that additional weight will turn the scale and render the consideration sufficient to support the agreement.'" Bull v. Bull, 43 Conn. 455; Fisher v. May, 2 Bibb. 449; Reed v. Bartlett, 19 Pick. 273; Union Bank v. Geary, 5 Peters, 99–114; Le Page v. McCrea, 1 Wend. 164; Boyd v. Hitchcock, 20 Johns. 76; Brooks v. White, 2 Metc. 283; Jones v. Perkins, 29 Miss. 139–141; Hall v. Smith, 15 Iowa, 584; Babcock v. Hawkins, 23 Vt. 561.

In the case at bar the defendants gave their promissory notes upon time for one-half of the debt they owed plaintiffs, and also gave plaintiffs a chattel mortgage on the stock, fixtures, and other personal property of the defendants under an agreement with plaintiffs, to accept the same in full satisfaction and discharge of said indebtedness. Defendants paid the notes as they became due, and plaintiffs then discharged the mortgage. Under the cases above cited, and upon principle, this new agreement was supported by a sufficient consideration to make it a valid agreement, and this agreement was by the parties substituted in place of the former. The consideration of the new agreement was that the plaintiffs, in place of an open book account for goods sold, got the defendants' promissory notes, probably negotiable in form, signed by defendants, thus saving the plaintiffs perhaps the trouble or expense of proving their account, and got security upon all the defendants' personal property for the payment of the sum specified in the notes, where before they had no security.

It was some trouble, at least, and perhaps some expense to the defendants to execute and deliver the security, and they deprived themselves of the legal ownership, or of any exemptions or the power of disposing of this property, and gave the plaintiffs such ownership as against the defendants, and the claims thereto of defendants' creditors, if there were any.

It seems to me, upon principle and the decisions of this State (save, perhaps, Keeler v. Salisbury, 33 N. Y. 653, and Platts v. Walrath, Lalor's Supp. 59, which I will notice further on), and of quite all of the other States, the transactions between the plaintiffs and the defendants constitute a bar to this action. All that is necessary to produce satisfaction of the former agreement is a sufficient consideration to support the substituted agreement. The doctrine is fully sustained in the opinion of Judge Andrews in Allison v. Abendroth (108 N. Y. 470), from which I quote: "But it is held that where there is an independent consideration, or the creditor receives any benefit or is put in a better position, or one from which there may be legal possibility of benefit to which he was not entitled except for the agreement, then the agreement is not *nudum pactum,* and the doctrine of the common law to which we have adverted has no application." Upon this distinction the cases rest which hold that the acceptance by the creditor in discharge of the debt of a different thing from that contracted to be paid, although of much less pecuniary value or amount, is a good satisfaction, as, for example, a negotiable instrument binding the debtor and a third person for a smaller sum. Curlewis v. Clark, 3 Exch. 375. Following the same principle, it is held that when the debtor enters into a new contract with the creditor to do something which he was not bound to do by the original contract, the new contract is a good accord and satisfaction if so agreed.

The case of accepting the sole liability of one of two joint debtors or copartners in satisfaction of the joint or copartnership debt is an illustration. This is held to be a good satisfaction, because the sole liability of one of two debtors "may be more beneficial than the joint liability of both, either in respect of the solvency of the parties, or the convenience of the remedy." Thompson v. Percival, 5 B. & Adol. 925. In perfect accord with this principle is the recent case in this court of Luddington v. Bell (77 N. Y. 138), in which it was held that the acceptance by a creditor of the individual note of one of the members of a copartnership after dissolution for a portion of the copartnership debt was a good consideration for the creditor's agreement to discharge the maker from further liability. Purdee v. Wood, 8 Hun, 584; Douglass v. White, 3 Barb. Chy. 621–624.

Notwithstanding these later and decisive authorities, the plaintiffs contend that [despite] the giving of the defendants' notes with the chattel mortgage security and the payment, such consideration was insufficient to support the new or substituted agreement, and cites as authority for such contention the cases of Platts v. Walrath (Lalor's Supp. 59) and Keeler v. Salisbury (33 N. Y. 648).

Platts v. Walrath arose in justice court, and the debt in controversy was put forth as a set-off. The remarks of the judge in the former case were quite obiter, for there were various subjects in dispute upon the trial, and from which the justice might have reached the conclusion that he did. The judge in the opinion relied upon says: "Looking at the loose and secondary character of the evidence as stated in the return, it was perhaps a question of fact whether any mortgage at all was given; or, at least, whether, if given, it was not in terms a mere collateral security for the large note," "even the mortgagee was left to parol proof. Did it refer to and profess to be a security for the note of $1500, or that sum less the fifty dollars agreed to be thrown off, etc., etc.?"

There is so much confusion and uncertainty in the case that it was not thought advisable to publish the case in the regular series of reports. The case of Keeler v. Salisbury, *supra,* is not to be regarded as an authority upon the question or as approving the case of Platts v. Walrath, *supra.* In the case of Keeler v. Salisbury, the debtor's wife had joined in the mortgage given by her husband, the debtor, to effect the compromise, thus releasing her inchoate right of dower. The court held that fact constituted a sufficient consideration to support the new agreement, though the court in the course of the opinion remarked that it had been held that the debtor's mortgage would not be sufficient, and referred to Platts v. Walrath. But the court did not otherwise indicate any approval of that case, and there was no occasion to do so, for, as before stated, the court put its decision upon the fact that the wife had joined in the mortgage.

In view of the peculiar facts in these two cases and the numerous decisions of this and other courts hereinbefore referred to, I do not regard them as authorities against the defendants' contention that the plaintiffs' action for the balance of the original debt is barred by reason of the accord and satisfaction, and that the judgment should be reversed, with costs. All concur.

Judgment reversed.[1]

9 Cyc. 354 (76); 355–356 (77–79); 20 L. R. A. 785; W. P. 844 (53); 211 (20–21); 13 C. L. R. 156; 6 Mich. L. R. 169.

WOODS, C. J., IN CLAYTON *v.* CLARK.

74 MISSISSIPPI, 499.—1896.

[In this case a note for $2789 was by agreement surrendered upon the payment of $1000. The payee subsequently brought suit for the balance.]

It has been held in England, though not unbrokenly, nor without now and then hostile criticism from bench and bar, that an agreement by a creditor with his debtor to accept a smaller sum of money in satisfaction of an ascertained debt of a greater sum, is without consideration, and is not binding upon the creditor, even though he has received the smaller sum agreed upon in the new contract. And in the United States, blindly following what was supposed to be settled law in England for nearly three hundred years, our courts have uniformly announced adherence to this rule, though in most of the cases

[1] But in New York, in Shanley v. Koehler, 80 Appellate Division, 566 (affirmed, 178 N. Y. 556) it was held that where a person, against whom a judgment for two hundred and twenty-six dollars and twenty-nine cents has been obtained, makes an arrangement with the judgment creditor, by which the latter agrees to satisfy the judgment upon receiving from the judgment debtor fifty dollars in cash and his unindorsed promissory note for fifty dollars, payable in three months, with interest, and in pursuance of this arrangement, the judgment debtor pays the fifty dollars in cash, gives the promissory note and pays the same at maturity, taking from the judgment creditor a receipt stating that the payment was "in full settlement of his account," the transaction does not constitute an accord and satisfaction which will prevent the judgment creditor from subsequently enforcing the judgment for the amount remaining unpaid thereon. (Syllabus.) The note was a negotiable promissory note.

In Grant v. Porter, 63 N. H. 229, the court said, "Ordinarily, payment and acceptance of a smaller sum for a larger one due is no discharge of the larger. Blanchard v. Noyes, 3 N. H. 519; Mathewson v. Bank, 45 N. H. 104, 107. But payment by a third person at the request of the debtor, either in money or by note, accepted by the creditor in full satisfaction and discharge of the debt, is an exception to the rule, and extinguishes the debt. Brooks v. White, 2 Met. 283."

examined by us no such announcement was necessary to their determination.

The rule is, in nearly all the cases, declared to have been first announced in Pinnel's case (5 Coke's Rep. 117)[1] whereas an examination of that mischievous and misleading reported case will make it appear at once that the question before us was not in any way involved. Pinnel's[2] plea was, that before the maturity of his bond for the larger sum, plaintiff had accepted a lesser sum agreed upon between the parties, in full satisfaction of the original debt. Now, all the authorities, American and English, including Coke himself, agree that this was a good defense, and that the plaintiff was bound by it, if defendant should properly plead it to a suit for the entire original debt. But the hapless Pinnel[2] in that remote period when courts were almost

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[1] Pinnel brought an action of debt on a bond against Cole of 16*l.* for payment of 8*l.* 10*s.* the 11th day of November, 1600. The defendant pleaded, that at the instance of the plaintiff, before the said day, *scil.* 1 Octob. *anno* 44, *apud W. solvit querenti* 5*l.* 2*s.* 2*d.* *quas quidem* 5*l.* 2*s.* 2*d.* the plaintiff accepted in full satisfaction of the 8*l.* 10*s.* And it was resolved by the whole court, that payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum; but the gift of a horse, hawk, or robe, etc., in satisfaction is good. For it shall be intended that a horse, hawk, robe, etc., might be more beneficial to the plaintiff than the money, in respect of some circumstance, or otherwise the plaintiff would not have accepted of it in satisfaction. But when the whole sum is due, by no intendment the acceptance of parcel can be a satisfaction to the plaintiff. But in the case at bar it was resolved that the payment and acceptance of parcel before the day, in satisfaction of the whole, would be a good satisfaction in regard of circumstance of time; for peradventure parcel of it before the day would be more beneficial to him than the whole at the day, and the value of the satisfaction is not material. So, if I am bound in 20*l.* to pay you 10*l.* at Westminster, and you request me to pay you 5*l.* at the day at York, and you will accept it in full satisfaction of the whole 10*l.*, it is a good satisfaction for the whole; for the expenses to pay it at York is sufficient satisfaction.

But in this case the plaintiff had judgment for the insufficient pleading; for he [defendant] did not plead that he had paid the 5*l.* 2*s.* 2*d.* in full satisfaction (as by law he ought), but pleaded the payment of part generally, and that the plaintiff accepted it in full satisfaction. And always the manner of the tender and of the payment shall be directed by him who made the tender or payment, and not by him who accepts it. And for this cause judgment was given for the plaintiff.

See reader 26 H. 6 Barre, 37, in debt on a bond for 10*l.*, the defendant pleaded that one F was bound by the said deed with him, and each in the whole, and that the plaintiff had made an acquittance to F bearing date before the obligation, and delivered after, by which acquittance he did acknowledge himself to be paid 20*s.* in full satisfaction of the 10*l.* And it was adjudged a good bar; for if a man acknowledges himself to be satisfied by deed, it is a good bar, without anything being received. *Vide* 12 R. 2, Barre, 243; 26 H. 6 Barre, 37 and 10 H. 7, etc.—Pinnel's case, 5 Coke's Rep. 117 (1602).

[2] A slip for defendant, Cole.—EDS.

as jealous for the observance of technical rules of special pleading as for the execution of justice according to right, was adjudged to pay the whole debt, the plaintiff having judgment against him, because of his "insufficient pleading, for," says Coke, "he did not plead that he had paid the £5, 2*s.* 2*d.* in full satisfaction (as by law he ought), but pleaded the payment of part generally, and that the plaintiff accepted it in full satisfaction." . . .

The rule is found in Pinnel's case, but it is bald dictum, and, as stated by Lord Blackburn, in Foakes v. Beer, before the House of Lords (9 App. Cas. 605), for the long period of one hundred and fifteen years after Pinnel's case was decided no case is to be found "in which the question was raised whether payment of a lesser sum would be satisfaction of a liquidated demand." [1] . . .

Turning now to the holdings of the American courts on this question, we are profoundly and painfully impressed with the slavish adherence of the legal and judicial mind to precedent, or, in many cases, to what seems to be precedent only. [The learned judge then discusses some of the American cases.]

The absurdity and unreasonableness of the rule seem to be generally conceded, but there also seems to remain a wavering, shadowy belief in the fact, falsely so called, that the agreement to accept, and the actual acceptance of, a lesser sum in the full satisfaction of a larger sum, is without any consideration to support it—that is, that the new agreement confers no benefit upon the creditor. However it may have seemed three hundred years ago in England, when trade and commerce had not yet burst their swaddling bands, at this day and in this country, where almost every man is in some way or other engaged in trade or commerce, it is as ridiculous as it is untrue to say that the payment of a lesser part of an originally greater debt, cash in hand, without vexation, cost, and delay, or the hazard of litigation in an effort to collect all, is not often—nay, generally—greatly to the benefit of the creditor. Why shall not money—the thing sought to be secured by new notes of third parties, notes where payment in money is designed to be secured by mortgage, and even negotiable notes of the

[1] In that case Lord Blackburn says: "What principally weighs with me in thinking that Lord Coke made a mistake of fact is my conviction that all men of business, whether merchants or tradesmen, do every day recognize and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent, and sure to pay at last, this often is so. Where the credit of the debtor is doubtful it must be more so. I had persuaded myself that there was no such long-continued action on this dictum as to render it improper in this House to reconsider the question. I had written my reasons for so thinking; but as they were not satisfactory to the other noble and learned Lords who heard the case, I do not now repeat them nor persist in them." (9 App. Cas. 605, 622–623.)

debtor himself—why shall not the actual payment of money, cash in hand, be held to be as good consideration for a new agreement, as beneficial to the creditor, as any mere promises to pay the same amount, by whomsoever made and however secured? And why may not men make and substitute a new contract and agreement for an old one, even if the old contract calls for a money payment? And why may one accept a horse worth $100 in full satisfaction of a promissory note for $1000, and be bound thereby, and yet not be legally bound by his agreement to accept $999, and his actual acceptance of it, in full satisfaction of the $1000 note? No reason can be assigned except that just adverted to, and this rests upon a mistake in fact. And a rule of law which declares that under no circumstances, however favorable and beneficial to the creditor, or however hard and full of sacrifice to the debtor, can the payment of a less sum of money at the time and place stipulated in the original obligation, or afterwards, for a greater sum, though accepted by the creditor in full satisfaction of the whole debt, ever amount in law to satisfaction of the original debt, is absurd, irrational, unsupported by reason, and not founded in authority, as has been declared by courts of the highest respectability, and of last resort, even when yielding reluctant assent to it. We decline to adopt or to follow it, and if there is anything in the cases of Jones v. Perkins (29 Miss. 139) or Pulliam v. Taylor (50 Miss. 251) which may be regarded as sanctioning the rule that the payment of a less sum of money, though agreed to be received in full satisfaction of a debt greater in amount than such agreed payment, shall not be so considered in legal contemplation, then, to that extent those cases are hereby overruled; and the case of Burrus v. Gordon (57 Miss. 93), in so far as it sanctions the rule we are combating, is hereby overruled.

[WHITFIELD, J., specially concurred in the decision on the ground that the delivery up of a note by the holder to the maker is a complete discharge.] [1]

9 Cyc. 354–356 (76–79); W. P. 211 (21); 11 H. L. R. 193; 11 H. L. R. 330.

[1] The doctrine that a part payment of a liquidated sum will not discharge the debt has been changed by statute in the following states: Alabama, California, Georgia, Maine, North Carolina, North Dakota, Oregon, South Dakota, Tennessee and Virginia.

The doctrine has been changed by judicial decision in Mississippi, Clayton v. Clark, *supra*, and apparently in New Hampshire, Frye v. Hubbel, 74 N. H. 358. In Arkansas, it is held that the giving of a receipt, in full, for a partial payment, discharges the debt. Dreyfus v. Roberts, 75 Ark. 354. In some other States when there is a partial payment and the giving of a receipt in full, it is a gift of the residue. Holmes v. Holmes, 129 Mich. 412; Gray v. Barton, 55 N. Y. 68; Lamprey v. Lamprey, 29 Minn. 151 (Semble). In some States a partial payment is satisfaction if the debtor is insolvent. Engbretson v. Seiberling, 122 Ia. 522; Shelton v. Jackson, 20 Tex. Civ. App. 443; and see, Mebroy v. Kemmerer, 218 Pa. 381.

Composition with creditors.

WILLIAMS *v.* CARRINGTON.

1 HILTON, 515.—1857.

(*New York Common Pleas.*)

Action for debt. Defense, accord and satisfaction by composition. Appeal from judgment of Marine Court in favor of plaintiff.

Defendant having made a composition with several of his creditors at forty cents on the dollar, made a similar agreement with plaintiffs by which he agreed to pay them forty cents on the dollar, and did pay them such amount, and received a receipt in full of their account. Defendant at the same time gave to plaintiffs a sealed instrument by which he bound himself to pay to them an additional forty per cent as soon as his compromise should be effected, on condition that plaintiffs sign a paper purporting to compromise his indebtedness to them for forty per cent. The composition was never completed, and plaintiffs bring this action. There was no evidence that plaintiffs ever executed a composition deed, or that other creditors were induced to enter into a compromise in consequence of the agreement with plaintiffs.

DALY, J. It was essential, in this case, to show that other creditors had consented to accept the forty per cent in discharge of their claims in consequence of the plaintiffs' consenting to do so. The consideration which supports such an agreement, when it is not under seal, is the mutual understanding, among all who become parties to it, that each is to take the composition agreed upon, and forbear further to press or insist upon their claims. It is said in Good v. Cheesman (2 Barn. & Adolph. 328), by Lord Tenterden, "that a creditor shall not bring an action where others have been induced to *join him* in a composition with the debtor; each party giving the rest reason to believe that, in consequence of such engagement, his demand will not be enforced. This is, in fact, a new agreement, substituted for the original contract with the debtor; the consideration to each creditor being the engagement of the others not to press their individual claims." It must appear that the act of the plaintiff, in accepting the forty per cent, operated as an inducement to other creditors to do the same, otherwise it is but the acceptance of a lesser sum for a greater, which is no satisfaction. Thus in Lowe v. Equitar (7 Price, 604) the plaintiff agreed with the defendant to execute a deed of composition with the other creditors, and take the benefit of the composition with them, in consideration that the defendant would also deliver to him a picture of the value of £500. The picture was delivered and accepted by the plaintiff in full satisfaction of his claim, and the defendant and all the other creditors, *except the plaintiff*, signed the composition deed.

The plaintiff sued for the original debt, and a plea setting up these facts was held to be no bar. I am inclined to think, from the report of this case, that the picture was accepted in lieu of, or as a payment of the composition, and if so, it was a case, in its essential features, like the present. Where creditors meet together, and the terms of the composition are arranged, as was the case in Cockshott v. Bennett (2 Term Rep. 763), or as in Good v. Cheesman, *supra,* put their names to an agreement or memorandum of the term, all the creditors present at such meeting, or all who sign the writing, enter into a mutual engagement, each with the other, to accept the amount proposed by way of compromise, and to forbear further to insist upon their claims. Where creditors thus mutually agree with each other, the beneficial consideration to each creditor is the engagement of the rest to forbear. A fund is thereby secured for the general advantage of all; and if any one of the parties were allowed afterwards to enforce his whole claim, it would operate to the detriment of the other creditors who have relied upon his agreement to forbear, and might even deprive them of the sum it was mutually agreed they should receive, by putting it out of the power of the debtor to carry out the composition. I know of no case, however, in which an acceptance, by a creditor from his debtor, of a certain sum in discharge of his debt, where other creditors have done the same, has been held to be a satisfaction, unless there was something in the case to show that the other creditors acted with the knowledge of his concurrence, and it could be assumed that their agreement necessarily contemplated and was founded in the benefit and advantage to be derived from his agreement also to forbear—in the language of Lord Tenterden, that they "were induced to join him in the composition." It is very probable, in this case, that such was the fact—very probable that the plaintiffs signed the composition, but nothing of the kind appears in the evidence. For all that appears in the testimony, the other creditors may have accepted the forty per cent without knowing that the plaintiffs had received that sum, or had agreed to accept it. We would not be justified in presuming, upon this evidence, that they did, against what must be regarded as a direct finding by the judge below, that they did not. We would have to hold that the judgment he gave was against evidence, and we could not, I think, go that length.

The judgment must be affirmed; but as the question is not very fully discussed by either party upon the written argument submitted, and as it is of a good deal of practical importance, I think the defendant should be allowed, if he wishes it, to carry the case to the Court of Appeals.

[INGRAHAM, F. J., also read for affirmance.]

BRADY, J., dissented.

Judgment affirmed.

8 Cyc. 419 (34); 419–420 (36–37); 9 Cyc. 356 (80).

PERKINS *v.* LOCKWOOD.

100 MASSACHUSETTS, 249.—1868.

Action on a promissory note upon which was the following indorsement:

"December 14, 1864. Received on the within note $10.38, being the first instalment towards $15.94, being ten per cent of said note, which when paid is to be in full satisfaction and settlement of the within note, provided that no other creditor shall receive more than ten per cent on his claim against Lockwood & Connell, and provided also that if any creditor shall receive more than ten per cent, an amount equal to such percentage shall be paid on the within note."

WELLS, J. An agreement to accept, in satisfaction and discharge of a liquidated debt, a sum less than the full amount due, is not valid, unless there exist some consideration to support it other than the payment or promise of the debtor to pay such less sum. Harriman v. Harriman, 12 Gray, 341. The note or collateral promise of another person will support the agreement. Brooks v. White, 2 Met. 283. For a like reason, when such an agreement forms part of a composition in which several creditors join, mutually stipulating to withdraw or withhold suits and that they will release to their common debtor a part of their claims upon payment of a certain other part, the agreement becomes binding between each creditor and the debtor. Eaton v. Lincoln, 13 Mass. 424; Steinman v. Magnus, 11 East, 390. The reason is, that the rights and interests of other parties become involved in the arrangement, and this affords a new and legal consideration for the promise. It would be contrary to good faith for a creditor who has secured the advantage of such an arrangement to disregard its obligations by proceeding to enforce the balance of his demand; and the debtor is entitled to avail himself of this consideration in defense. Good v. Cheesman, 2 B. & Ad. 328; Boyd v. Hind, 1 H. & N. 938.

In this case, the exceptions do not show that there was any such mutual agreement between the creditors. The defense indicated by the most important ruling of the court appears to be based entirely upon the legal effect of the agreement between the plaintiff and defendant as indorsed upon the notes in suit. That agreement affects no other party. Its reference to the like settlement of other debts is merely in the nature of a condition attached to the plaintiff's promise to discharge the notes. It does not make it any the more binding. The defendant's undertaking, that he would not pay others more than the plaintiff, would not prevent others from enforcing their claims in full, and is not such a promise as would afford any consideration for the agreement of the plaintiff. It is neither a benefit to the plaintiff nor disadvantage to the defendant. So far as the exceptions show,

the release of their claims by the other creditors had no connection with this agreement. The agreement itself shows no legal consideration to give it effect as a contract.

As we understand the exceptions, the court below ruled that the agreement indorsed upon the notes constituted of itself "a legal and valid contract, binding on the plaintiff." This we think was clearly wrong; and for this cause the

Exceptions are sustained.

9 Cyc. 356 (80).

Mutual subscriptions.

THE PRESBYTERIAN CHURCH OF ALBANY *v.* COOPER.

112 NEW YORK, 517.—1889.

Appeal from order of the General Term of the Supreme Court in the third judicial department, which reversed a judgment in favor of plaintiff, entered upon the report of a referee, and ordered a new trial. (Reported below, 45 Hun, 453.)

This was a reference under the statute of a disputed claim against the estate of Thomas P. Crook, defendant's intestate. The claim arose under a subscription paper, of which the following is a copy:

"We, the undersigned, hereby severally promise and agree to and with the trustees of the Presbyterian Church in this city of Albany, in consideration of one dollar to each of us in hand paid and the agreements of each other in this contract contained, to pay on or before three years from the date hereof to said trustees the sum set opposite to our respective names, but upon the express condition, and not otherwise, that the sum of $45,000 in the aggregate shall be subscribed and paid in for the purpose hereinafter stated; and if within one year from this date said sum shall not be subscribed or paid in for such purpose, then this agreement to be null and of no effect. The purpose of this subscription is to pay off the mortgage debt of $45,000, now a lien upon the church edifice of said church, and the subscription or contribution for that purpose must equal that sum in the aggregate to make this agreement binding.

"Dated May 18, 1884."

The defendants' intestate made two subscriptions to this paper, one of $5,000 and the other of $500. He paid upon the subscription $2,000. The claim was for the balance.

ANDREWS, J. It is, we think, an insuperable objection to the maintenance of this action, that there was no valid consideration to uphold the subscription of the defendants' intestate. It is, of course, unquestionable that no action can be maintained to enforce a gratuitous promise, however worthy the object intended to be promoted. The performance of such a promise rests wholly on the will of the person making it. He can refuse to perform, and his legal right to do so can-

not be disputed, although his refusal may disappoint reasonable expectations, or may not be justified in the forum of conscience. By the terms of the subscription paper the subscribers promise and agree to and with the trustees of the First Presbyterian Church of Albany, to pay to said trustees, within three years from its date, the sums severally subscribed by them, for the purpose of paying off "the mortgage debt of $45,000, on the church edifice," upon the condition that the whole sum shall be subscribed or paid in within one year. It recites a consideration, viz., "in consideration of one dollar to each of us (subscribers) in hand paid and the agreements of each other in this contract contained." It was shown that the one dollar recited to have been paid was not in fact paid, and the fact that the promise of each subscriber was made by reason of and in reliance upon similar promises by the others constitutes no consideration as between the corporation for whose benefit the promise was made and the promisors. The recital of a consideration paid does not preclude the promisor from disputing the fact in a case like this, nor does the statement of a particular consideration which, on its face, is insufficient to support a promise, give it any validity, although the fact recited may be true.

It has sometimes been supposed that when several persons promise to contribute to a common object, desired by all, the promise of each may be a good consideration for the promise of others, and this although the object in view is one in which the promisors have no pecuniary or legal interest, and the performance of the promise by one of the promisors would not in a legal sense be beneficial to the others. This seems to have been the view of the chancellor as expressed in Hamilton College v. Stewart when it was before the Court of Errors (2 Den. 417), and *dicta* of judges will be found to the same effect in other cases. Trustees, &c., v. Stetson, 5 Pick. 508; Watkins v. Eames, 9 Cush. 537. But the doctrine of the chancellor, as we understand, was overruled when the Hamilton College case came before this court (1 N. Y. 581), as have been also the *dicta* in the Massachusetts cases, by the court in that State, in the recent case of Cottage Street Methodist Episcopal Church v. Kendall, 121 Mass. 528. The doctrine seems to us unsound in principle. It proceeds on the assumption that a stranger both to the consideration and the promise, and whose only relation to the transaction is that of donee of an executory gift, may sue to enforce the payment of the gratuity for the reason that there has been a breach of contract between the several promisors and a failure to carry out as between themselves their mutual engagement. It is in no proper sense a case of mutual promises, as between the plaintiff and defendant.

In the disposition of this case we must, therefore, reject the consideration recited in the subscription paper as ground for supporting the promise of the defendants' intestate, the money consideration, be-

cause it had no basis in fact, and the mutual promises between the subscribers, because there is no privity of contract between the plaintiff and the promisors. Some consideration must, therefore, be found other than that expressly stated in the subscription paper, in order to sustain the action. It is urged that a consideration may be found in the efforts of the trustees of the plaintiff during the year, and the time and labor expended by them during that time, to secure subscriptions in order to fulfill the condition upon which the liability of the subscribers depended. There is no doubt that labor and services, rendered by one party at the request of another, constitute a good consideration for a promise made by the latter to the former, based on the rendition of the service. But the plaintiff encounters the difficulty that there is no evidence, express or implied, on the face of the subscription paper, nor any evidence outside of it, that the corporation or its trustees did, or undertook to do anything upon the invitation or request of the subscribers.[1] Nor is there any evidence that the trustees of the plaintiff, as representatives of the corporation, in fact did anything in their corporate capacity, or otherwise than as individuals, interested in promoting the general object in view.

Leaving out of the subscription paper the affirmative statement of the consideration (which, for reasons stated, may be rejected), it stands as a naked promise of the subscribers to pay the several amounts subscribed by them for the purpose of paying the mortgage on the church property upon a condition precedent limiting their liability. Neither the church nor the trustees promise to do anything, nor are they re-

[1] "Nor need a request to the promisee to perform the services be expressed in the instrument; it may be implied. (Trustees of Hamilton College v. Stewart, 1 N. Y. 581; Barnes v. Perine, 12 ib. 18; Presb. Church of Albany v. Cooper, 112 ib. 517.) In the latter case, Judge Andrews re-asserts the doctrine, as laid down in the earlier cases, that a naked promise to pay money, bare of any condition, accepted by the promisee, to do something, will not be sustained; but he, very distinctly, recognizes the rule that where there is a request to the promisee to go on and render services, or to incur liabilities, on the faith of a subscription, which request is complied with, the subscription would be binding. It may be observed that the difficulty in the case last mentioned, and which prevented the maintenance of the action upon the defendant's subscription, was, as Judge Andrews stated, that there was 'no evidence, express or implied, on the face of the subscription paper, *nor any evidence outside of it*, that the corporation, or its trustees, did, or undertook to do, anything on the invitation or request of the subscribers.' Now the evidence of the witness Ball showed that the plaintiff was provisionally chartered as a college and that it was necessary to raise a certain sum of money to entitle it to a full charter; that a large sum had been promised, conditionally upon $20,000 being raised by a certain time from others, and that the defendant's promise to pay $500 was a step in the plaintiff's proceeding, which invited it to continue its efforts and whereby it was, impliedly, requested to do so and to expend the incidental time and money in accomplishing the purpose."—Keuka College v. Ray, 167 N. Y. 96.

quested to do anything, nor can such a request be implied. It was held in Hamilton College v. Stewart (1 N. Y. 581) that no such request could be implied from the terms of the subscription in that case, in which the ground for such an implication was, to say the least, as strong as in this case. It may be assumed from the fact that the subscriptions were to be paid to the trustees of the church for the purpose of paying the mortgage, that it was understood that the trustees were to make the payment out of the moneys received. But the duty to make such payment, in case they accepted the money, would arise out of their duty as trustees. This duty would arise upon the receipt of the money, although they had no antecedent knowledge of the subscription. They did not assume even this obligation by the terms of the subscription, and the fact that the trustees applied money, paid on subscriptions, upon the mortgage debt, did not constitute a consideration for the promise of the defendants' intestate.

We are unable to distinguish this case in principle from Hamilton College v. Stewart, 1. N. Y. 581. There is nothing that can be urged to sustain this subscription that could not, with equal force, have been urged to sustain the subscription in that case. In both the promise was to the trustees of the respective corporations. In each case the defendant had paid part of his subscription and resisted the balance. In both, part of the subscription had been collected and applied by the trustees to the purpose specified. In the Hamilton College case (which in that respect is unlike the present one) it appeared that the trustees had incurred expense in employing agents to procure subscriptions to make up the required amount, and it was shown, also, that professors had been employed upon the strength of the fund subscribed. That case has not been overruled, but has been frequently cited with approval in the courts of this and other States.

The cases of Barnes v. Perine (12 N. Y. 18) and Roberts v. Cobb (103 Id. 600) are not in conflict with that decision. There is, we suppose, no doubt that a subscription, invalid at the time for want of consideration, may be made valid and binding by a consideration arising subsequently between the subscribers and the church or corporation for whose benefit it is made. Both of the cases cited, as we understand them, were supported on this principle. There was, as was held by the court in each of these cases, a subsequent request by the subscriber to the promisee to go on and render service or incur liabilities on the faith of the subscription, which request was complied with, and services were rendered or liabilities incurred pursuant thereto. It was as if the request was made at the very time of the subscription, followed by performance of the request by the promisor. Judge Allen, in his opinion in Barnes v. Perine, said, "the request and promise were, to every legal effect, simultaneous," and he expressly disclaims any intention to interfere with the decision in the Hamilton

College case. In the present case it was shown that individual trustees were active in procuring subscriptions. But, as has been said, they acted as individuals, and not in their official capacity. They were deeply interested, as was Mr. Crook, in the success of the effort to pay the debt on the church, and they acted in unison. But what the trustees did was not prompted by any request from Mr. Crook. They were co-laborers in promoting a common object. We can but regret that the intention of the intestate in respect to a matter in which he was deeply interested, and whose interest was manifested up to the very time of his death, is thwarted by the conclusion we have reached. But we think there is no alternative, and that the order should be affirmed. All concur.

Order affirmed and judgment accordingly.

37 Cyc. 485–492 (29–51); esp., 485 (29) and 490 (37); W. P. 186 (3).

SHERWIN v. FLETCHER.

168 MASSACHUSETTS, 413.—1897.

Contract on the following agreement:

"We, the undersigned subscribers, do hereby agree to pay the sum set against our respective names, the same to be payable under and in accordance with the following conditions, namely:

"1. The money by us subscribed is to be used for the purpose of erecting a building in the town of Ayer, to be used for the manufacture of boots and shoes.

"2. The details regarding the plan under which the subscribers hereto shall organize themselves, and upon which said building shall be erected and rented, shall be hereafter fixed and determined by a majority in numbers and interest of the subscribers hereto, at a meeting to be duly called for that purpose.

"3. No subscriptions hereto shall be binding until the sum of twelve thousand (12,000) dollars shall have been raised.

"SAMUEL W. FLETCHER. $200."

It is alleged that the $12,000 was fully subscribed; that at a meeting, duly called, a majority in number and interest of the subscribers organized the "Ayer Building Association," elected the plaintiffs trustees, and authorized the purchase of land and the erection of a building; that relying upon defendant's promise the trustees purchased the land and erected the building; that defendant refuses to pay, etc.

Defendant demurred on the ground that no promise was made to these plaintiffs and that there was no consideration for the promise.

Demurrer overruled. Defendant appeals.

ALLEN, J. The demurrer to the declaration was rightly overruled. The written agreement signed by the defendant was virtually a promise to pay to such person or persons as should be fixed at a meeting of the

subscribers. This promise was at the outset an offer, but when steps were taken in pursuance of Article 2, and a plan was fixed and determined as therein provided, and the plaintiffs were chosen trustees, they became the promisees; and when they proceeded to erect a building in reliance upon the subscriptions of defendant and others, and before any withdrawal or retraction by him, that supplied a good consideration, and the promise became valid and binding in law. Athol Music Hall Co. v. Carey, 116 Mass. 471; Davis v. Smith American Organ Co., 117 Mass. 456; Cottage Street Church v. Kendall, 121 Mass. 528; Hudson Real Estate Co. v. Tower, 156 Mass. 82; S. C. 161 Mass. 10.

Judgment affirmed.

37 Cyc. 487 (33); W. P. 186 (3); 15 H. L. R. 312.

MARTIN, and Others *v.* MELES, and Others.

179 MASSACHUSETTS, 114.—1901.

HOLMES, C. J. This is an action to recover the contribution promised by the following paper, which was signed by the defendants and others,—"January 21, 1896. We, the undersigned manufacturers of leather, promise to contribute the sum of five hundred (500) dollars each, and such additional sums as a committee appointed by the Massachusetts Morocco Manufacturers Association may require; in no case shall the Committee demand from any manufacturer or firm a total of subscriptions to exceed the sum of two thousand (2,000) dollars, such sum to be employed for legal and other expenses, under the direction of the Committee, in defending and protecting our interests against any demands or suits growing out of Letters Patent for Chrome Tanning, and in case of suit against any of us, the Committee shall take charge thereof and apply as much of the fund as may be needed to the expense of the same."

The plaintiffs are the committee referred to in the agreement, and subscribers to it. They were appointed and did some work before the date of the agreement, and then prepared the agreement which was signed by nine members of the association mentioned, and by the defendants who were not members. They went on with their work, undertook the defence of suits, and levied assessments which were paid, the defendants having paid $750. In November, 1896, the defendants' firm was dissolved, and two members of it, Meles and Auerbach, ceased tanning leather. The defendants notified the plaintiffs of the dissolution, and on June 23, 1897, upon demand for the rest of their subscription refused to pay the same. The main questions insisted upon, raised by demurrer and by various exceptions, are

whether the defendants' promise is to be regarded as entire and as supported by a sufficient consideration.

It will be observed that this is not a subscription to a charity. It is a business agreement for purposes in which the parties had a common interest, and in which the defendants still had an interest after going out of business, as they still were liable to be sued. It contemplates the undertaking of active and more or less arduous duties by the committee, and the making of expenditures and incurring of liabilities on the faith of it. The committee by signing the agreement promised by implication not only to accept the subscribers' money but to perform those duties. It is a mistaken construction to say that their promise, or indeed their obligation, arose only as the promise of the subscribers was performed by payments of money.

If then the committee's promise should be regarded as the consideration, as in Institute v. French, 16 Gray, 196, 201 (see Institute v. Haskell, 71 Me. 487), its sufficiency hardly would be open to the objection which has been urged against the doctrine of that case, that the promise of trustees to apply the funds received for a mere benevolence to the purposes of the trust imposes no new burden upon them. Johnson v. University, 41 Ohio St. 527, 531. See Prebyterian Church v. Cooper, 112 N. Y. 517, 20 N. E. 352. Neither would it raise the question whether the promise to receive a gift was a consideration for a promise to make one. The most serious doubt is whether the promise of the committee purports to be the consideration for the subscriptions by a true interpretation of the contract.

In the later Massachusetts cases more weight has been laid on the incurring of other liabilities and making expenditures on the faith of the defendant's promise than on the counter-promise of the plaintiff. Cottage St. Church v. Kendall, 121 Mass. 528, 23 Am. Rep. 286; Sherwin v. Fletcher, 168 Mass. 413, 47 N. E. 197. Of course the mere fact that a promisee relies upon a promise made without other consideration does not impart validity to what before was void. Bragg v. Danielson, 141 Mass. 195, 196, 4 N. E. 622. There must be some ground for saying that the acts done in reliance upon the promise were contemplated by the form of the transaction either impliedly or in terms as the conventional inducement, motive and equivalent for the promise. But courts have gone very great lengths in discovering the implication of such an equivalence, sometimes perhaps even having found it in matters which would seem to be no more than conditions or natural consequences of the promise. There is the strongest reason for interpreting a business agreement in the sense which will give it a legal support, and such agreements have been so interpreted. Sherwin v. Fletcher, *ubi supra.*

What we have said justifies, in our opinion, the finding of a consideration either in the promise or in the subsequent acts of the com-

mittee, and it may be questioned whether a nicer interpretation of the contract for the purpose of deciding which of the two was the true one is necessary. It is true that it is urged that the acts of the committee would have been done whether the defendants had promised or not, and therefore lose their competence as consideration because they cannot be said to have been done in reliance upon the promise. But that is a speculation upon which courts do not enter. When an act has been done, to the knowledge of another party, which purports expressly to invite certain conduct on his part, and that conduct on his part follows, it is only under exceptional and peculiar circumstances that it will be inquired how far the act in truth was the motive for the conduct, whether in case of consideration,—Williams v. Carwardine, 4 Barn. & Adol. 621 (see Institute v. Haskell, 71 Me. 487), —or of fraud. Windram v. French, 151 Mass. 547, 553, 24 N. E. 914, 8 L. R. A. 750. In Cottage St. Church v. Kendall, 121 Mass. 528, the form of the finding in terms excluded subsequent acts as consideration, and therefore it did not appear whether the facts were such that reliance upon the promise would be presumed. In Academy v. Gilbert, 2 Pick. 579, 13 Am. Dec. 457, the point was that merely signing a subscription paper without more did not invite expenditure on the faith of it. See Academy v. Cowls, 6 Pick, 427, 438, 17 Am. Dec. 387; Ives v. Sterling, 6 Metc. 310, 316. In this case the paper indisputably invited the committee to proceed.

A more serious difficulty if the acts are the consideration is that it seems to lead to the dilemma that either all acts to be done by the committee must be accomplished before the consideration is furnished, or else that the defendant's promise is to be taken distributively and divided up into distinct promises to pay successive sums as successive steps of the committee may make further payments necessary and may furnish consideration for requiring them. The last view is artificial and may be laid on one side. In the most noticeable cases where a man has been held entitled to stop before he has finished his payments, the ground has not been the divisibility of his undertaking but the absence of consideration, which required the court to leave things where it found them. In re Hudson, 54 Law J. Ch. 811; Presbyterian Church v. Cooper, 112 N. Y. 517, 20 N. E. 352. As against the former view, if necessary, we should assume that the first substantial act done by the committee was all that was required in the way of acts to found the defendant's obligation. See Academy v. Cowls, 6 Pick. 427, 438, 17 Am. Dec. 387. But if that were true, it would follow that as to the future conduct of the committee their promise not their performance was the consideration, and when we have got as far as that, it may be doubted whether it is not simpler and more reasonable to set the defendants' promise against the plaintiffs' promise alone. We are inclined to this view, but do not deem a more definitive deci-

sion necessary, as we are clearly of opinion that, one way or the other, the defendants must pay. . . .

Before leaving the case it is interesting to remark that the notion rightly exploded in Cottage St. Church v. Kendall, 121 Mass. 528, 530, 531, 23 Am. Rep. 286, that the subscription of others than the plaintiff may be a consideration, seems to have remained unquestioned with regard to agreements of creditors to accept a composition. Compare the remarks of Wells, J., in Perkins v. Lockwood, 100 Mass. 249, 250, 1 Am. Rep. 103 (Farrington v. Hodgdon, 119 Mass. 453, 457; Trecy v. Jefts, 149 Mass. 211, 212, 21 N. E. 360; Emerson v. Gerber [Mass.] 59 N. E. 666), with what he says in Music Hall Co. v. Carey, 116 Mass. 471, 474.

It is not argued that whatever contract was made was not made with the plaintiffs. Sherwin v. Fletcher, 168 Mass. 413, 47 N. E. 197.

Demurrer overruled.

Exceptions overruled.

37 Cyc. 486 (32–33); 489 (38); W. P. 187 (4); 361 (14).

(*iii.*) *Consideration must be legal.*

NOTE.—For cases on legality of consideration, see cases on "Legality of Object," *post*, Part I. Ch. IV.

(*iv.*) *Consideration may be executory or executed, it must not be past.*

DEARBORN *v.* BOWMAN.

3 METCALF (MASS.), 155.—1841.

Assumpsit on a note in these terms: "June 17, 1839. I promise to pay Dearbon & Bellows sixty dollars in ninety days, value received. Bowman." Defense, want of consideration.

SHAW, C. J. The defense to the action to recover the amount of this note is want of consideration. It is manifest from the note itself, that it is not a negotiable instrument, being payable neither to order nor to bearer; indeed, it appears by the case, that the defendant declined making it negotiable. But total want of consideration is a good defense even to an action on a negotiable note, when brought by the promisee against the maker. Then the question is, whether upon the facts shown, any consideration appears for this promise. The note was given in consequence of services before that time performed by the plaintiffs, in printing and circulating extra papers and documents, previously to an election of state senators, at which the de-

fendant was a candidate. Such services imposed no obligations, legal or moral, on the defendant; and it would be somewhat dangerous to hold that they created any honorary obligation on him to pay for them. Nor would it be aided in a legal view, by a previous custom, if proved, for candidates to contribute to the payment of similar expenses, whether successful or otherwise in the election.

Nor were these services performed at the request of the defendant. On the contrary, it appears by the evidence that they were performed by General Staples, chairman of the county committee, who alone was responsible for the payment, and between whom and the defendant there was no privity, nor even any communication, until long after the services had been performed. The rule of law seems to be now well settled—though it may have formerly been left in doubt—that the past performance of services constitutes no consideration even for an express promise, unless they were performed at the express or implied request of the defendant, or unless they were done in performance of some duty or obligation resting on the defendant. Mills v. Wyman, 3 Pick. 207; Loomis v. Newhall, 15 Pick. 159; Dodge v. Adams, 19 Pick. 429. As the services performed by the plaintiffs were not done at the request of the defendant, as they were not done in the fulfilment of any duty or obligation resting on him, there was no consideration to convert the express promise of the defendant into a legal obligation.

Another ground, however, was taken in behalf of the plaintiffs, which was, that the discharge by the plaintiffs, of their legal demand against Staples, was a good consideration for the defendant's promise to them. If such discharge was in fact given, and given at the defendant's request, or if the defendant had promised to pay if they would discharge Staples *pro tanto*, and they did discharge him, it would have been a good consideration for the defendant's promise. But there is no evidence to establish the fact.

The court are of opinion that there was no legal consideration for the defendant's promise, and that no action can be maintained upon it. Plaintiffs nonsuit.

9 Cyc. 358 (90); 359 (92). W. P. 199 (11); 200 (13).

MILLS *v.* WYMAN.

3 PICKERING (MASS.), 207.—1826.

Action of assumpsit to recover compensation for the board and care of defendant's adult son who fell sick among strangers, and was provided for under these circumstances by the plaintiff, the defendant having afterwards written to the plaintiff promising to pay him for expenses incurred.

PARKER, C. J. General rules of law established for the protection

and security of honest and fair-minded men, who may inconsiderately make promises without any equivalent, will sometimes screen men of a different character from engagements which they are bound in *foro conscientiæ* to perform. This is a defect inherent in all human systems of legislation. The rule that a mere verbal promise, without any consideration, cannot be enforced by action, is universal in its application, and cannot be departed from to suit particular cases in which a refusal to perform such a promise may be disgraceful.

The promise declared on in this case appears to have been made without any legal consideration. The kindness and services towards the sick son of the defendant were not bestowed at his request. The son was in no respect under the care of the defendant. He was twenty-five years old, and had long left his father's family. On his return from a foreign country, he fell sick among strangers, and the plaintiff acted the part of the good Samaritan, giving him shelter and comfort until he died. The defendant, his father, on being informed of this event, influenced by a transient feeling of gratitude, promises in writing to pay the plaintiff for the expenses he had incurred. But he has determined to break this promise, and is willing to have his case appear on record as a strong example of particular injustice sometimes necessarily resulting from the operation of general rules.

It is said a moral obligation is a sufficient consideration to support an express promise, and some authorities lay down the rule thus broadly; but upon examination of the cases we are satisfied that the universality of the rule cannot be supported, and that there must have been some pre-existing obligation, which has become inoperative by positive law, to form a basis for an effective promise. The cases of debts barred by the statute of limitations, of debts incurred by infants, of debts of bankrupts, are generally put for illustration of the rule. Express promises founded on such pre-existing equitable obligations may be enforced; there is a good consideration for them; they merely remove an impediment created by law to the recovery of debts honestly due, but which public policy protects the debtors from being compelled to pay. In all these cases there was originally a *quid pro quo;* and according to the principles of natural justice, the party receiving ought to pay; but the legislature has said he shall not be coerced; then comes the promise to pay the debt that is barred, the promise of the man to pay the debt of the infant, of the discharged bankrupt to restore to his creditor what by the law he had lost. In all these cases there is a moral obligation founded upon an antecedent valuable consideration. These promises, therefore, have a sound legal basis. They are not promises to pay something for nothing; not naked pacts; but the voluntary revival or creation of obligation which before existed in natural law, but which has been dispensed with, not for the benefit of the party obliged solely, but principally for the public con-

venience. If moral obligation, in its fullest sense, is a good substratum for an express promise, it is not easy to perceive why it is not equally good to support an implied promise. What a man ought to do, generally he ought to be made to do, whether he promise or refuse. But the law of society has left most of such obligations to the *interior* forum, as the tribunal of conscience has been aptly called. Is there not a moral obligation upon every son who has become affluent by means of the education and advantages bestowed upon him by his father, to relieve that father from pecuniary embarrassment, to promote his comfort and happiness, and even to share with him his riches, if thereby he will be made happy? And yet such a son may, with impunity, leave such a father in any degree of penury above that which will expose the community in which he dwells to the danger of being obliged to preserve him from absolute want. Is not a wealthy father under strong moral obligation to advance the interest of an obedient, well-disposed son, to furnish him with the means of acquiring and maintaining a becoming rank in life, to rescue him from the horrors of debt incurred by misfortune? Yet the law will uphold him in any degree of parsimony, short of that which would reduce his son to the necessity of seeking public charity.

Without doubt, there are great interests of society which justify withholding the coercive arm of the law from these duties of imperfect obligation, as they are called; imperfect, not because they are less binding upon the conscience than those which are called perfect, but because the wisdom of the social law does not impose sanctions upon them.

A deliberate promise, in writing, made freely and without any mistake, one which may lead the party to whom it is made into contracts and expenses, cannot be broken without a violation of moral duty. But if there was nothing paid or promised for it, the law, perhaps wisely, leaves the execution of it to the conscience of him who makes it. It is only when the party making the promise gains something, or he to whom it is made loses something, that the law gives the promise validity. And in the case of the promise of the adult to pay the debt of the infant, of the debtor discharged by the statute of limitations or bankruptcy, the principle is preserved by looking back to the origin of the transaction, where an equivalent is to be found. An exact equivalent is not required by the law; for there being a consideration, the parties are left to estimate its value: though here the courts of equity will step in to relieve from gross inadequacy between the consideration and the promise.

These principles are deduced from the general current of decided cases upon the subject, as well as from the known maxims of the common law. The general position, that moral obligation is a sufficient consideration for an express promise, is to be limited in its application,

to cases where at some time or other a good or valuable consideration has existed.

A legal obligation is always a sufficient consideration to support either an express or an implied promise; such as an infant's debt for necessaries, or a father's promise to pay for the support and education of his minor children. But when the child shall have attained to manhood, and shall have become his own agent in the world's business, the debts he incurs, whatever may be their nature, create no obligation upon the father; and it seems to follow, that his promise founded upon such a debt has no legally binding force.

The cases of instruments under seal and certain mercantile contracts, in which considerations need not be proved, do not contradict the principles above suggested. The first import a consideration in themselves, and the second belong to a branch of the mercantile law, which has found it necessary to disregard the point of consideration in respect to instruments negotiable in their nature and essential to the interests of commerce.

Instead of citing a multiplicity of cases to support the positions I have taken, I will only refer to a very able review of all the cases in the note in 3 Bos. & Pull. 249. The opinions of the judges had been variant for a long course of years upon this subject, but there seems to be no case in which it was nakedly decided that a promise to pay the debt of a son of full age, not living with his father, though the debt were incurred by sickness which ended in the death of the son, without a previous request by the father proved or presumed, could be enforced by action.

It has been attempted to show a legal obligation on the part of the defendant by virtue of our statute, which compels lineal kindred in the ascending or descending line to support such of their poor relations as are likely to become chargeable to the town where they have their settlement. But it is a sufficient answer to this position, that such legal obligation does not exist except in the very cases provided for in the statute, and never until the party charged has been adjudged to be of sufficient ability thereto. We do not know from the report any of the facts which are necessary to create such an obligation. Whether the deceased had a legal settlement in this commonwealth at the time of his death, whether he was likely to become chargeable had he lived, whether the defendant was of sufficient ability, are essential facts to be adjudicated by the court to which is given jurisdiction on this subject. The legal liability does not arise until these facts have all been ascertained by judgment, after hearing the party intended to be charged.

For the foregoing reasons we are all of opinion that the nonsuit directed by the Court of Common Pleas was right, and that judgment be entered thereon for costs for the defendant.

9 Cyc. 358 (90); 359 (92); W. P. 199 (11). *Moral obligation:* 9 Cyc. 356 (82); 53 L. R. A. 353; 26 L. R. A. (N. S.) 520.

Consideration moved by previous request.

HICKS *v.* BURHANS.

10 JOHNSON (N. Y.), 242.—1813.

In error, on *certiorari,* from a justice's court. B. and others brought an action of *assumpsit* against Hicks, before the justice. The cause was tried by a jury. The plaintiffs gave in evidence a writing dated the 16th of January, 1808, signed by the defendant and ten others, reciting that whereas the plaintiffs had, previous to the date of the writing, been in pursuit of several persons who had absconded and were in debt to the subscribers, they, the subscribers, promised to pay to the plaintiffs, or either of them, an equal proportion of all the expenses which the plaintiffs had been at, in pursuing such fugitive debtors, and also promised to pay their equal proportion of all further expenses the plaintiffs should be at in further pursuing the said persons, etc. The plaintiffs proved an account of the expenses, amounting to about one hundred and thirty-eight dollars; and that the defendant examined the account when presented to the creditors, and made no objection to it, except to a charge of twenty dollars.

The jury gave a verdict for the plaintiffs for seventeen dollars, on which the justice gave judgment.

Per Curiam. The written promise to pay, if founded on a past consideration, may be good, if the past service be laid to have been done on request; and if not so laid, a request may be implied from the beneficial nature of the consideration, and the circumstances of the transaction. 1 Caines' Rep. 585, 586. Here the past service consisted in an expensive pursuit, by the plaintiffs, of certain fugitive debtors, who were indebted to the defendant and others; and it appeared that the plaintiffs had exhibited their accounts, at a meeting of the creditors, and that the defendant examined them, and made no objection, except to a single *item* of the charges. A request, in this case, might have been implied; and we ought to intend it to have been proved upon trial. There are no formal pleadings in the case, and the return does not negative the fact of a request.

There was no other objection raised that merits notice. The judgment must be affirmed.

Judgment affirmed.[1]

9 Cyc. 360-361 (97-99, 1-4); W. P. 200 (13).

[1] "Where the evidence or circumstances do not clearly show that the executed consideration was a gratuity, or was something else which cast no legal obligation on the promisor, and out of which the law created no promise, the jury under the direction of the court may infer, as of fact or law, a previous request, to satisfy the justice of the particular case."—Bishop on Cont. (1887), § 92.

Voluntarily doing what another was legally bound to do.

THOMSON *v.* THOMSON.

76 N. Y. APPELLATE DIVISION, 178.—1902.

KELLOGG, J. The record shows that defendant was indebted to Campbell, Sprague & Co. in the sum of thirty-six dollars and seventy cents for materials purchased. The plaintiffs being under no obligation to Campbell, Sprague & Co. on account of this claim, nevertheless paid it without any previous request on the part of defendant. After the plaintiffs had paid the claim, they applied to defendant and he promised to pay them the sum so by them expended for his benefit. The circumstances are such that no implied request to pay the claim can be found other than such as can be based upon the subsequent express promise of defendant to repay the plaintiffs. On this express promise the action is brought, and the action is defended on the ground that the express promise is not supported by a sufficient consideration to make it enforcible at law. The question here presented was much discussed in the earlier cases, and the cases disclose a great difference of opinion in the minds of eminent jurists. Among the earliest is the case of Wennall v. Adney (3 B. & P. 249, 252, note) which announced the proper rule to be that an express promise "can only revive a precedent good consideration which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law; but can give no original right of action, if the obligation on which it is founded never could have been enforced at law though not barred by any legal maxim or statute provision." Under this rule express promises of infants after age, and that of bankrupts after discharge, of married women after coverture has ceased, have been held to be good when the original debt was of their own contracting.

Subsequently the court in the case of Lee v. Muggeridge (55 Taunt. 37) went farther, and the rule was laid down by Mansfield, Ch. J., and his associates in broad terms: "It has been long established that where a person is bound morally and conscientiously to pay a debt though not legally bound, a subsequent promise to pay will give a right of action." This rule seems to have prevailed in the English

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In Moore v. Elmer, 180 Mass. 15, the court said, "the modern authorities which speak of services rendered upon a request as supporting a promise must be confined to cases where the request implies an undertaking to pay, and do not mean that what was done as a mere favor can be turned into a consideration at a later time by the fact that it was asked for. See Langdell, Contracts, §§ 92 *et seq.*; Chamberlin v. Whitford, 102 Mass. 448, 450; Dearborn v. Bowman, 3 Met. 155, 158; Johnson v. Kimball, 172 Mass. 398, 400."

courts until the case of Eastwood v. Kenyon (11 Ad. & El. 438) in which Lord Denman, Ch. J., criticises the rule laid down in Lee v. Muggeridge and declares in substance that a beneficial service or pecuniary benefit conferred without request and adopted by a beneficiary is not such a consideration as will support an action on the subsequent express promise of the beneficiary to reimburse. So far as I have been able to discover this rule of law as laid down by Lord Denman has since prevailed in the English courts.

In Mills v. Wyman (3 Pick. 209) Parker, Ch. J., says: "It is said a moral obligation is a sufficient consideration to support an express promise, and some authorities lay down the rule thus broadly; but upon examination of the cases, we are satisfied that the universality of the rule cannot be supported, and that there must have been some pre-existing obligation which has become inoperative by positive law to form a basis for an effective promise. The cases of debts barred by the statute of limitations, of debts incurred by infants, of debts of bankrupts, are generally put for illustration of the rule. Express promises founded on such pre-existing equitable obligations may be enforced." This is the rule as laid down in the Supreme Court of Massachusetts in 1825, and I do not find that it has since been departed from in the courts of that State.

Among the first cases in the courts of this State, where the question was necessarily decided, is Hicks v. Burhans (10 Johns. 243). The court in that case says: "The written promise to pay, if founded on a past consideration, may be good if the past service be laid to have been done on request; and if not so laid, a request may be implied from the beneficial nature of the consideration and the circumstances of the transaction. . . . Here the past service consisted in an expensive pursuit by the plaintiffs of certain fugitive debtors who were indebted to the defendant and others." In this case the court held that a request to do the service might be implied, though the service had been already rendered.

The next case is that of Doty v. Wilson (14 Johns. 378). The plaintiff as sheriff held the defendant on a body execution, and allowed him to go at large. Judgment was had against the sheriff for the amount the defendant was held for, and, after payment, the defendant promised to reimburse the sheriff. This promise was held to be supported by a sufficient consideration. The court, by Thompson, Ch. J., says: "We may here refer to the cases as well collected in 1 Saund. 264, n. 1. [Osborne v. Rogers, 1 Saund. (3d Am. ed.) * 264, n. 1.] It is there laid down as the result of all of them, that where a party derives a benefit from the consideration, it is sufficient because equivalent to a previous request. As where a man pays a sum of money for me, without my request, and I afterwards agree to the payment, this is equivalent to a previous request to do so. . . . The benefit to the

defendant connected with his express promise to pay must be deemed equivalent to a previous request. It was an adoption of the payment as made for the benefit of the defendant, and a subsequent ratification is equivalent to an original command." The case of Bentley v. Morse (14 Johns. 468) was one where the consideration for the express promise was solely a moral one. The case of Nixon v. Jenkins (1 Hilt. 318) is an action on an express promise supported only by a beneficial past consideration. The plaintiff, by mistake, paid defendant's taxes, and subsequently defendant promised to refund the amount to plaintiff. The court said: "The money paid was for the defendant Porter's benefit, to which he assented by promising to pay. He derived a benefit from it, and that was equivalent to a previous request." And in support of this rule of law the court cites Doty v. Wilson, *supra.*

If the cases above cited correctly express the rule of law as observed in the courts of this State, then the plaintiff in the case before us should hold the judgment of the Justice Court, and the County Court should be reversed. But it would seem that the rule as expressed in a long line of later cases fails to go so far. In Chilcott v. Trimble (13 Barb. 508) the court says: "These cases must be taken with some qualification"; and approves the rule as laid down in Wennall v. Adney (3 B. & P. 249, *supra*). This is again said in Ehle v. Judson (24 Wend. 98) by Bronson, J., in referring to Doty v. Wilson: "This rule must be taken with some qualifications. The moral obligation to pay a debt barred by the statute of limitations, or an insolvent's discharge, or to pay a debt contracted during infancy or coverture, and the like, will be a good consideration for an express promise. But a merely moral or conscientious obligation, unconnected with any prior legal or equitable claim, is not enough."

Ingraham v. Gilbert (20 Barb. 154): "The rule in Eastwood v. Kenyon (11 Ad. & Ellis, 438) is decisive of this case. It is there held that 'a pecuniary benefit voluntarily conferred by the plaintiff and adopted by the defendant, is not such a consideration as will support an action of assumpsit on a subsequent express promise.'"

In Goulding v. Davidson (26 N. Y. 604)the rule as laid down in Ehle v. Judson, *supra,* is stated with approval.

From all the cases, I am of the opinion that the broad rule declared in Doty v. Wilson is not the rule of law accepted by the courts of this State, but rather that the rule laid down in Eastwood v. Kenyon is the adopted rule, and that rule applied to the facts in the case before us prevents a recovery by the plaintiff.

The contention of the learned counsel for appellant, that a judgment in favor of plaintiff might be supported on the theory of a ratification by the principal of the acts of an agent, is not tenable for the reason that such ratification of an agent's acts only makes the agent's

acts the acts of the principal, and does not create any liability to the agent himself.

The judgment of the County Court should be affirmed.

9 Cyc. 365 (30–32).

WRIGHT *v.* THE FARMER'S NATIONAL BANK.

31 TEXAS CIVIL APPEALS, 406.—1903.

CONNER, Chief Justice. Appellee, who was plaintiff below, instituted this suit in the county court of Clay county to recover $320.41, because of a payment of that sum in satisfaction of a judgment and execution against appellant, and which it was alleged appellant subsequently promised to pay.

The petition, charge of the court, and trial all evidently were predicated on the theory of the subsequent promise. Hence the exceptions to the petition and to the charge of the court and to the refusal of special charges, based on appellant's theory that the payment was voluntary, seem immaterial. Voluntary though appellee's payment may have been, if, as alleged and proven, the judgment was thereby wholly discharged, appellant's resultant benefit constituted a sufficient consideration for a subsequent promise to repay appellee the amount paid in satisfaction of the judgment. 1 Pars. on Cont., 8 ed., p. 473; Tied. on Com. Paper, sec. 162. . . .

9 Cyc. 365 (30–32).

Reviving agreement barred by some rule of law.

DUSENBURY, Executor, *v.* HOYT.

53 NEW YORK, 521.—1873.

The action was upon a promissory note. The defendant pleaded his discharge in bankruptcy. Upon the trial, after proof of the discharge, plaintiff offered to prove subsequent promise of the defendant to pay the note. Defendant objected upon the ground that the action was upon the note, not upon the new promise. The court sustained the objection, and directed a verdict for defendant, which was rendered accordingly. Plaintiff appeals.

ANDREWS, J. The 34th section of the bankrupt law declares that a discharge in bankruptcy releases the bankrupt from all debts provable under the act, and that it may be pleaded as a full and complete bar to all suits brought thereon.

The legal obligation of the bankrupt is by force of positive law discharged, and the remedy of the creditor existing at the time the discharge was granted to recover his debt by suit is barred. But the

debt is not paid by the discharge. The moral obligation of the bankrupt to pay it remains. It is due in conscience, although discharged in law, and this moral obligation, uniting with a subsequent promise by the bankrupt to pay the debt, gives a right of action. It was held in Shippy v. Henderson (14 J. R. 178) that it was proper for the plaintiff, when the bankrupt had promised to pay the debt after his discharge, to bring his action upon the original demand, and to reply the new promise in avoidance of the discharge set out in the plea. The court, following the English authorities, said that the replication of the new promise was not a departure from the declaration, but supported it by removing the bar interposed by the plea, and that in point of pleading it was like the cases where the defense of infancy or the statute of limitations was relied upon. The case of Shippy v. Henderson was followed in subsequent cases, and the doctrine declared in it became, prior to the Code, the settled law. McNair v. Gilbert, 3 Wend. 344; Wait v. Morris, 6 Id. 394; Fitzgerald v. Alexander, 19 Id. 402.

The question whether the new promise is the real cause of action, and the discharged debt the consideration which supports it, or whether the new promise operates as a waiver by the bankrupt of the defense which the discharge gives him against the original demand, has occasioned much diversity of judicial opinion. The former view was held by Marcy, J., in Depuy v. Swart (3 Wend. 139), and is probably the one best supported by authority. But, after as before the decision in that case, the court held that the original demand might be treated as the cause of action, and for the purpose of the remedy, the decree in bankruptcy was regarded as a discharge of the debt *sub modo* only, and the new promise as a waiver of the bar to the recovery of the debt created by the discharge. We are of opinion that the rule of pleading, so well settled and so long established, should be adhered to. The original debt may still be considered the cause of action for the purpose of the remedy. The objection that, as no replication is now required, the pleadings will not disclose the new promise, is equally applicable where a new promise is relied upon to avoid the defense of infancy or the statute of limitations, and in these cases the plaintiff may now, as before the Code, declare upon the original demand. Esselstyn v. Weeks, 12 N. Y. 635.

The offer of the plaintiff to prove an unconditional promise by the defendant, after his discharge, to pay the debt, was improperly overruled, and the judgment should, for this reason, be reversed, and a new trial ordered, with costs to abide the event.

All concur, except Folger, J., not voting.

Judgment reversed.[1]

9 Cyc. 363 (20).

[1] *Action barred by statute of limitations.*—In Ilsley v. Jewett, 3 Met. 439,

SHEPARD *v.* RHODES.

7 RHODE ISLAND, 470.—1863.

Assumpsit. Demurrer to declaration.

BULLOCK, J. The count demurred to states, in substance, that the plaintiffs had discharged the defendants from a certain debt, then due and owing from them to the plaintiffs, in consideration of dividends to be received from the proceeds of certain effects assigned by the defendants; and that, subsequent to such discharge, the defendants feeling themselves honorably bound to pay to the plaintiffs this debt, in consideration thereof and of one dollar to them paid, made the following *new* promise, to wit, to pay to the plaintiffs in one year after a final dividend, any difference that might exist between their full debt and interest and the amount of any dividend or dividends the plaintiffs might have previously received. The count further states, that more than one year has elapsed since the plaintiffs received notice that *no* dividend would be paid them from the assigned effects.

This statement of the cause of action shows, in effect, two separate and distinct considerations, as the foundation of the *new* promise: *first,* a *moral* consideration, that the defendants, notwithstanding their discharge, felt themselves in honor bound to pay the plaintiffs' debt; and, *second,* the *valuable* consideration of one dollar, paid to the defendants by the plaintiffs when the new promise was made.

Are these considerations, as stated, sufficient in law to sustain the promise? Passing by the earlier cases, referred to at length in a note to the report of Wennall v. Adney (3 Bos. & Pull. 249), and some of which hold to the opposite, it may now be deemed settled, that no action can be maintained upon a promise founded upon a mere moral consideration. Mills v. Wyman, 3 Pick. 207; Eastwood v. Kenyon, 11 Ad. & Ell. 438; Beaumont v. Reeve, 8 Ad. & Ell. (N. S.) 483; S. C. 55 Eng. C. L. 483. It has been said, that such a doc-

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the court said, "a payment, or new promise, or an admission from which a new promise may be inferred, is considered as removing out of the way a bar arising from the statute of limitations, so as to enable the creditor to recover notwithstanding the limitation; and not as the creation of a new substantive contract, which is to be the basis of the judgment."

In Ireland v. Mackintosh, 22 Utah, 296, the court said, "the note in question upon the expiration of the statutory period ceased to have any binding efficacy in this State other than that moral obligation which, though it might constitute a sufficient consideration for a new promise would not in the face of the statute support an action on the original obligation to pay. A new promise, however, does not revive the former obligation, but creates a new one, and no recovery can be had except in an action based upon the new promise, instituted within the period prescribed by the statute. Anthony v. Savage, 2 Utah, 466; Gruenberg v. Buerhing, 5 Utah, 414; Kuhn v. Mount, 13 Utah, 108."

trine is not creditable to the common law; but the rule has its origin in the widely diversified character of moral duties, and the consequent difficulty of measuring them with exactness, and determining which are so high and obligatory in their nature as to demand, in their performance, the payment of money.

There is a class of cases which for the most part have been regarded as not falling within the rule, that a mere moral consideration will not support a promise. Of such is the case of a promise barred by the statute of limitations, where the party is under no legal liability to pay when the promise is made. And so, of the promise of an infant, made after he becomes of age, to pay a debt incurred during his minority, and which debt he is then at liberty to ratify or avoid. Upon the same principle, a promise to pay a debt originally usurious, where usury avoids the contract, but freed from all usury at the time the new promise is made, is binding, because the original contract is not *void,* but voidable only at the election of the borrower. And so, the promise of a bankrupt, made after certificate of discharge *granted* may be enforced, although now, in England, by statute (6 Geo. IV. c. 16) the promise must be in *writing.* But it is settled, that such considerations as love, friendship, natural affection, even the close relation existing between parent and child, are not, of themselves, sufficient to support an express promise. Whether the promise of a *feme covert,* after coverture ended, to pay a debt contracted during coverture, falls within the limit of the exception, has been a subject of frequent discussion, and of decisions somewhat contrariant. In Lee v. Muggeridge (5 Taunt. 36) an action was upheld against her executors, upon the bond of a *femc covert,* followed by her promise to pay, *dum sola.* But this case can hardly be deemed authority since the decision in Eastwood v. Kenyon, *supra;* and in New York an action was maintained against a woman, upon a contract of retainer entered into by her before a divorce. Wilson v. Burr, 25 Wend. 386. A more leading case, in the same State, affirming the validity of such a promise, is that of Goulding v. Davidson (3 Am. L. Reg. N. S. 34; 26 N. Y. 604), recently decided in the Court of Appeals. The facts were, that a *feme covert* represented herself as unmarried and as trading on her own account, and so procured credit, and purchased goods, for which she gave her note. Her coverture was not known to the creditor. After the death of her husband, she promised to pay this debt, and an action was brought upon this promise. The decision proceeds, mainly, upon the ground, that being guilty of fraud in the original undertaking, *trover* or *replevin* might have been brought against her and her husband at any time after the supposed purchase was made, and since this cause of action existed against her during coverture, a promise by her, after coverture, rested upon this as a sufficient consideration.

The principle recognized in, and which, almost without exception, has controlled this class of cases, is this: that when the *precedent original* consideration was sufficient to sustain the promise, but the *right of action* was suspended or barred by some positive rule of statutory or common law, the debtor might, by a subsequent promise, waive the exemption which the law has interposed indirectly for his benefit, but, mainly, from reasons of sound policy.

The case here is one where the original right of action was extinguished, not by the act of the law, but by the act of the parties. It was a *voluntary* release of the debt by the creditor to the debtor. In Willing v. Peters (12 S. & R. 179) the question arose, how far a promise to pay a debt, thus discharged, might be enforced; and because of the analogy between waiving a discharge created by act of law and one created by act of the parties, the court upheld the action. Shaw, C. J., in Valentine v. Foster (1 Metc. 522), admits the closeness of the analogy, and suggests, if the rule be not narrow, that allows the waiver in the one case to bind the party, and rejects it in the other; but he adds, that the Pennsylvania authority is the only one he has been able to find in support of the doctrine; and in the case then before him, ruled, that when a creditor released a debtor to make him a witness, the subsequent promise of the debtor was not binding. Considering his own decision, and that the case of Willing v. Peters was subsequently overruled in the same court, in Snevily v. Read (9 Watts, 396), while in other courts it has been repeatedly adjudicated, that after the voluntary release of a debt, an express promise does not revive it, nor does it form a sufficient consideration to support the new promise, we may affirm that such, at present, is the settled law. Warren v. Whitney, 24 Maine, 561; Stafford v. Bacon, 1 Hill, 533.

But the plaintiffs aver an additional consideration for the defendants' promise, and this raises another question; because the former consideration not being illegal, but only insufficient, the latter may sustain the promise declared upon. This additional consideration is one dollar, for which, it is alleged, the defendants promised, etc., to pay a sum greater than $1000.

Ordinarily, courts do not go into the question of equality or inequality of considerations; but act upon the presumption that parties capable to contract are capable, as well, of regulating the terms of their contracts, granting relief only when the inequality is shown to have arisen from mistake, misrepresentation, or fraud. A different rule would, in every case, impose upon the court the necessity of inquiring into, and of determining the value of the property received by the party giving the promise. Such a course is obviously impracticable. In all cases, therefore, where the *assumption* or undertaking is founded upon the sale or exchange of merchandise or property, or

upon other than a money consideration, and the promise has been deliberately made, the law looks no further than to see that the obligation rests upon a consideration, that is, one recognized as legal, and of some value. But the reason of the rule ceases, and hence the rule ceases, when applied to contracts to pay money and founded solely upon a money consideration. How far a forbearance to sue, or the giving of time, or the mere waiver of some right, may support a promise, we do not consider, since the question does not arise. Nor, for the like reason, do we consider how far the rule is qualified or limited by special statutes regulating interest; or in that class of contracts peculiar to the law merchant, as bottomry, respondentia, and the course of exchange. Aside from these and some other exceptions, at common law a contract for the exchange of unequal sums of money at the same time, or at different times, when the element of time is no equivalent, is not binding; and in such cases courts may and do inquire into the equality of the contract; for its subject-matter, upon both sides, has not only a fixed value, but is itself the standard of all values; and so, for the difference of value, there is no consideration. In this principle, the earliest prohibitions—earlier even than the time of Alfred—and the later legislative enactments against usury, both in England and in this country, have their origin. The rule is deemed to be founded in good policy.

In the case before us, the only legal consideration the defendants received was one dollar, for which they engaged to pay a much larger sum. The case, therefore, falls within the principle adverted to. The consideration was not only unequal, but grossly so. It was a mere nominal consideration; if even received by the defendants, it was, no doubt, regarded as such by them, and intended as such by the promisees. It was, at best, purely technical and colorable, and obviously is wanting in that degree of equitable equality sufficient to support the promise declared upon.

The demurrer to the *first* count is therefore sustained.

9 Cyc. 363 (18); 359 (93); W. P. 193 (4); 199 (12).

CHAPTER III.

Reality of Consent.

Mistake.

(*i.*) *Non-agreement in terms.*

RUPLEY *et al.*, *v.* DAGGETT.

74 ILLINOIS, 351.—1874.

This was an action of replevin, brought by John F. Daggett against Abram Rupley and Jacob Rupley, to recover a mare which the defendants claimed they had bought of the plaintiff.

It appears that at the first conversation about the sale of the mare, Rupley asked the plaintiff his price, the plaintiff swearing that he replied $165, while the defendant testified that he said $65, and that he did not understand him to say $165. In the second conversation Rupley says he told Daggett, that if the mare was what he represented her to be, they would give $65, and Daggett said he would take him down next morning to see her. Daggett denied this, and says that Rupley said to him, "Did I understand you sixty-five?" Daggett states that he supposed Rupley referred to the fraction of the $100, and meant sixty-five as coupled with the price named at the previous interview. He answered, "Yes, sixty-five." Both parties, from this, supposed the price was fixed, Rupley supposing it was $65, and Daggett supposing it was $165, and the only thing remaining to be done, as each thought, was for Rupley to see the mare and decide whether she suited him. The next day Rupley came, saw the mare and took her home with him. The plaintiff recovered in the court below, and the defendants appealed.

Scott, J., delivered the opinion of the court.

It is very clear, from the evidence in this case, there was no sale of the property understandingly made. Appellee supposed he was selling for $165, and it may be appellant was equally honest in the belief that he was buying at the price of $65. There is, however, some evidence tending to show that appellant Rupley did not act with entire good faith. He was told, before he removed the mare from appellee's farm, there must be some mistake as to the price he was to pay for her. There is no dispute this information was given to him. He insisted, however, the price was $65, and expressed his belief he would keep her if there was a mistake. On his way home

with the mare in his possession, he met appellant, but never intimated to him he had been told there might be a misunderstanding as to the price he was to pay for her. This he ought to have done, so that, if there had been a misunderstanding between them, it could be corrected at once. If the price was to be $165, he had never agreed to pay that sum, and was under no sort of obligation to keep the property at that price. It was his privilege to return it. On the contrary, appellee had never agreed to sell for $65, and could not be compelled to part with his property for a less sum than he chose to ask. It is according to natural justice, where there is a mutual mistake in regard to the price of an article of property, there is no sale, and neither party is bound. There has been no meeting of the minds of the contracting parties, and hence there can be no sale. This principle is so elementary it needs no citation of authorities in its support. Any other rule would work injustice and might compel a person to part with his property without his consent, or to take and pay for property at a price he had never contracted to pay. . . .

Judgment affirmed.[1]

9 Cyc. 398 (7–8); W. P. 599 (54); 605 (63); 32 L. R. A. (N. S.) 429.

[1] In Rovegno v. Defferari, 40 Cal. 459, the court said: "A sale of this interest was supposed to have been made by Cassinelli to Defferari; but it turned out afterwards that the parties to that transaction (Cassinelli and Defferari) had entirely misunderstood each other as to the price to be paid. Cassinelli thought that he was selling for $850, and Defferari supposed himself to be purchasing at $750. Upon discovery of this mistake the latter refused to take the interest at $850. . . . Upon the ascertained fact that Cassinelli and Defferari were each mistaken as to the purchase price of this copartnership interest, and each was, therefore, assenting to a supposed contract which had no real existence, it results that there was no valid agreement, notwithstanding the apparent assent of each."

In Stoddard v. Ham, 129 Mass. 383, the court said: "It is elementary in the law governing contracts of sale and all other contracts, that the agreement is to be ascertained exclusively from the conduct of the parties and the language used when it is made, as applied to the subject-matter and to known usages. The assent must be mutual, and the union of minds is ascertained by some medium of communication. A proposal is made by one party, and is acceded to by the other in some kind of language mutually intelligible, and this is mutual assent. Met. Con. 14. A party cannot escape the natural and reasonable interpretation which must be put on what he says and does, by showing that his words were used and his acts done with a different and undisclosed intention. Foster v. Ropes, 111 Mass. 10, 16; Daley v. Carney, 117 Mass. 288; Wright v. Willis, 2 Allen, 191. 2 Chit. Con. (11th Am. ed.) 1022. It is not the secret purpose, but the expressed intention, which must govern, in the absence of fraud and mutual mistake. A party is estopped to deny that the intention communicated to the other side was not his real intention."

(*ii.*) *Mistake as to the nature, or as to the existence of the contract.*

WALKER *v.* EBERT.

29 WISCONSIN, 194.—1871.

Action on a promissory note, by a holder, who claims to have purchased it for full value, before maturity. Verdict for plaintiff. Defendant appeals.

DIXON, C. J. The defendant, having properly alleged the same facts in his answer, offered evidence and proposed to prove by himself as a witness on the stand, that at the time he signed the supposed note in suit, he was unable to read or write the English language; that when he signed the same, it was represented to him as, and he believed it was, a certain contract of an entirely different character, which contract he also offered to produce in evidence; that the contract offered to be produced was a contract appointing him, defendant, agent to sell a certain patent right, and no other or different contract, and not the note in question; and that the supposed note was never delivered by the defendant to any one. It was at the same time stated that the defendant did not claim to prove that the plaintiff did not purchase the supposed note before maturity and for value. To this evidence the plaintiff objected, and the objection was sustained by the court, and the evidence excluded, to which the defendant excepted; and this presents the only question.

We think it was error to reject the testimony. The two cases cited by counsel for the defendant (Foster v. McKinnon, L. R. 4 C. P. 704, and Whitney v. Snyder, 2 Lansing, 477) are very clear and explicit upon the point, and demonstrate, as it seems to us, beyond any rational doubt, the invalidity of such paper, even in the hands of a holder for value, before maturity, without notice. The party whose signature to such a paper is obtained *by fraud as to the character of the paper itself,* who is ignorant of such character, and has no intention of signing it, and who is guilty of no negligence in affixing his signature, or in not ascertaining the character of the instrument, is no more bound by it than if it were a total forgery, the signature included.

The reasoning of the above cases is entirely satisfactory and conclusive upon this point. The inquiry in such cases goes back of all questions of negotiability, or of the transfer of the supposed paper to a purchaser for value, before maturity and without notice. It challenges the origin or existence of the paper itself; and the proposition is, to show that it is not in law or in fact what it purports to be, namely, the promissory note of the supposed maker. For the purpose of setting on foot or pursuing this inquiry, it is immaterial

that the supposed instrument is negotiable in form, or that it may have passed to the hands of a *bona fide* holder for value. Negotiability in such cases presupposes the existence of the instrument as having been made by the party whose name is subscribed; for, until it has been so made and has such actual legal existence, it is absurd to talk about a negotiation, or transfer, or *bona fide* holder of it, within the meaning of the law merchant. That which, in contemplation of law, never existed as a negotiable instrument, cannot be held to be such; and to say that it is, and has the qualities of negotiability, because it assumes the form of that kind of paper, and thus to shut out all inquiry into its existence, or whether it is really and truly what it purports to be, is *petitio principii*—begging the question altogether. It is, to use a homely phrase, putting the cart before the horse, and reversing the true order of reasoning, or rather preventing all correct reasoning and investigation, by assuming the truth of the conclusion, and so precluding any inquiry into the antecedent fact or premise, which is the first point to be inquired of and ascertained. For the purposes of this first inquiry, which must be always open when the objection is raised, it is immaterial what may be the nature of the supposed instrument, whether negotiable or not, or whether transferred or negotiated, or to whom or in what manner, or for what consideration or value paid by the holder. It must always be competent for the party proposed to be charged upon any written instrument, to show that it is not his instrument or obligation. The principle is the same as where instruments are made by persons having no capacity to make binding contracts; as, by infants, married women, or insane persons; or where they are void for other cause, as, for usury; or where they are executed as by an agent, but without authority to bind the supposed principal. In these and all like cases, no additional validity is given to the instrument by putting them in the form of negotiable paper. See Veeder v. Town of Lima, 19 Wis. 297 to 299, and authorities there cited. See also Thomas v. Watkins, 16 Wis. 549.

And identical in principle, also, are those cases under the registry laws where the *bona fide* purchaser for value of land has been held not to be protected when the recorded deed under which he purchased and claims turns out to have been procured by fraud as to the signature, or purloined or stolen, or was a forgery and the like. See Everts v. Agnes, 4 Wis. 343, and the remarks of this court, pp. 351–353, inclusive.

In the case first above cited, the defendant was induced to put his name upon the back of a bill of exchange by the fraudulent representation of the acceptor that he was signing a guaranty. In an action against him as indorser, at the suit of a *bona fide* holder for value, the Lord Chief Justice, Boville, directed the jury that, "If the de-

fendant's signature to the document was obtained upon a fraudulent representation that it was a guaranty, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guaranty, and if he was not guilty of any negligence in so signing the paper, he was entitled to the verdict"; and this direction was held proper. In delivering the judgment of the court upon a rule *nisi* for a new trial, Byles, J., said:

"The case presented by the defendant is that he never made the contract declared on; that he never saw the face of the bill; that the purport of the contract was fraudulently misdescribed to him; that when he signed one thing, he was told and believed he was signing another and entirely different thing; and that his mind never went with his act. It seems plain on principle and on authority that if a blind man, or a man who cannot read, or for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper, which the blind or illiterate man afterwards signs, then at least, if there be no negligence, the signature so obtained is of no force; and it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore, in contemplation of law, never did sign the contract to which his name is appended."

And again, after remarking the distinction between the case under consideration and those where a party has written his name upon a blank piece of paper, intending that it should afterwards be filled up, and it is improperly so filled, or for a larger sum, or where he has written his name upon the back or across the face of a blank bill-stamp, as indorser or acceptor, and that has been fraudulently or improperly filled, or in short, where, under any circumstances, the party has voluntarily affixed his signature to commercial paper, *knowing what he was doing and intending the same to be put in circulation as a negotiable security,* and after also showing that in all such cases the party so signing will be liable for the full amount of the note or bill, when it has once passed into the hands of an innocent indorsee or holder, for value before maturity, and that such is the limit of the protection afforded to such an indorsee or holder, the learned judge proceeded:

"But in the case now under consideration, the defendant, according to the evidence, if believed, and the finding of the jury, never intended to indorse a bill of exchange at all, but intended to sign a contract of an entirely different nature. It was not his design, and, if he were guilty of no negligence, it was not even his fault that the instrument he signed turned out to be a bill of exchange. It was as if he had written his name on a sheet of paper for the purpose of franking a letter, or in a lady's album, or an order for admission to Temple Church, or on the fly-leaf of a book, and there had already been without his knowledge a bill of exchange or a promissory note payable to order inscribed on the other side of the paper. To make the

case clearer, suppose the bill or note on the other side of the paper in each of these cases to be written at a time subsequent to the signature, then the fraudulent misapplication of that genuine signature to a different purpose would have been a counterfeit alteration of a writing with intent to defraud, and would therefore have amounted to a forgery. In that case the signer would not have been bound by his signature for two reasons; first, that he never in fact signed the writing declared on, and secondly, that he never intended to sign any such contract.

"In the present case the first reason does not apply, but the second does apply. The defendant never intended to sign that contract, or any such contract. He never intended to put his name to any instrument that then was or thereafter might become negotiable. He was deceived not merely as to the legal effect, but as to the *actual contents* of the instrument."

The other case first above cited, Whitney v. Snyder, was in all respects like the present, a suit upon a promissory note by the purchaser before maturity, for value, against the maker; and the facts offered to be proved in defense were the same as here; and it was held that the evidence should have been admitted.

In Nance v. Lary (5 Ala. 370) it was held that where one writes his name on a blank piece of paper, of which another takes possession *without authority therefor,* and writes a promissory note above the signature, which he negotiates to a third person, who is ignorant of the circumstances, the former is not liable as the maker of the note to the holder. In that case the note was written over the signature by one Langford, and by him negotiated to the plaintiff in the action, who sued the defendant as maker. Collier, C. J., said:

"The making of the note by Langford was not a mere fraud upon the defendant; it was something more. It was quite as much a forgery as if he had found the blank or purloined it from the defendant's possession. If a recovery were allowed upon such a state of facts, then every one who ever indulges in the idle habit of writing his name for mere pastime, or leaves sufficient space between a title and his subscription, might be made a bankrupt by having promises to pay money written over his signature. Such a decision would be alarming to the community, has no warrant in law, and cannot receive our sanction."

And in Putnam v. Sullivan (4 Mass. 54) Chief Justice Parsons said:

"The counsel for the defendants agree that generally an indorsement obtained by fraud will hold the indorsers according to the terms of it, but they make a distinction between the cases where the indorser, through fraudulent pretenses, has been induced to indorse the note he is called on to pay, *and where he never intended to indorse a note of that description, but a different note and for a different purpose.* Perhaps there may be cases in which this distinction ought to prevail. *As, if a blind man had a note falsely and fraudulently read to him, and he indorsed it, supposing it to be the note read to him.* But we are satisfied that an indorser cannot avail himself of this distinction, but in cases where he is not chargeable with any laches or neglect or misplaced confidence in others."

See also 1 Parsons on Notes and Bills, 110 to 114, and cases cited in notes.

The judgment below must be reversed, and a *venire de novo* awarded. By the court. It is so ordered.[1]

9 Cyc. 390–391 (61–62); W. P. 585 (30); 23 H. L. R. 571.

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[1] In Lewis v. Clay, 67 L. J. Q. B. 224, an action was brought by payee against defendant as one of two makers of two joint and several promissory notes, for £3,113, 15*s*., and £8,000 respectively. It was admitted that defendant's signatures were genuine and that his signatures to two letters authorizing plaintiff to pay the proceeds to Lord William Nevill, the other maker, were also genuine. Plaintiff gave value in good faith for the notes. Defendant's signatures to the notes and letters were procured by Lord William Nevill in this wise: The latter came to defendant and asked him to witness some documents, producing a roll of papers covered by blotting or other paper in which there were four openings; defendant asked what the documents were and was answered that they concerned private family matters, that defendant could see them if he insisted, but it was preferred that he should not; defendant did not insist and signed his name four times through the openings. Lord William Nevill also signed, and defendant believed he was signing as witness to the former's signatures. Defendant had just come of age, had known Lord Nevill intimately for some years, and had no reason to doubt his honor. Lord Russell of Killowen, C. J., said: "Did the defendant make the promissory notes in question? If he did not, then the finding of the jury that defendant was not guilty of any want of due care establishes that he is not precluded from saying so. . . . Can it be said that in this case the defendant contracted to pay the plaintiff? His mind never went with such a transaction; for all that appears he had never heard of the plaintiff, and his mind was fraudulently directed into a different channel by the statement that he was merely witnessing a deed or other document. He had no contracting mind, and his signature obtained, by untrue statements fraudulently made, to a document of the existence of which he had no knowledge, cannot bind him. It is as if he had written his name for an autograph collector, or in an album. The case differs in no material respect from one in which a genuine signature is deftly transferred by delicate contrivance from one document to another, and so skillfully as to escape notice under ordinary examination. Or, again, if the body of the promissory notes had been fraudulently written above, and after his signature had been made, it would have been forgery, and in such case it is clear that no recourse could be had upon it. Can it make any difference as to resulting contractual obligation that the body of the note was, without his knowledge, filled up before he was fraudulently induced to put his name in the belief that it was something wholly different? I think not. In plain reason it must be said that the use to which the defendant's signature was applied was in substance and effect, forgery, whether or not it amounted to the criminal offence of forgery."

In Page v. Krekey, 137 N. Y. 307, the court said: "The judgment from which this appeal is taken was recovered upon a guaranty, signed by the defendant and sent to the plaintiff, a resident of Vermont, by mail. The plaintiff had business transactions with one Bernard Thinnes prior to the guaranty. The latter was a tanner in Brooklyn, and the plaintiff, a dealer in green calf skins, had shipped to him skins at various times to tan and, unless he elected to buy them at a certain price, then to return them, so

ALEXANDER *v.* BROGLEY.

63 NEW JERSEY LAW, 307.—1899.

Action by Hamil M. Alexander against John Brogley and others and John O. Bedford. Judgments for defendants were affirmed by the Supreme Court and plaintiff brings error.

DIXON, J. These suits were brought by the plaintiff as assignee of the Biographical Publishing Company. In the first of the suits the testimony before the trial court tended to prove that an agent of the company, engaged for it in collecting data and obtaining subscriptions for a book of biographies, applied to the defendant for the purpose of preparing a sketch of his life, and, after getting from him some details of the history of his family and himself, handed him a paper, with the request that he would sign his name upon it, so that in the sketch his name might be spelled correctly. Thereupon the defendant, not noticing anything upon the paper, signed his name. The paper thus signed contained a printed form of contract, purporting to bind the subscriber to take a copy of the book, and pay the publishing company $15 therefor. On this alleged agreement the suit

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tanned to the plaintiff, or deliver them according to his order. The following is the instrument upon which the action was brought:

BROOKLYN, N. Y., March 14, 1889.

Mr. C. S. Page, Hyde Park, Vt.:

I am well acquainted with B. A. Thinnes, tanner, of this place. I believe him to be a good tanner, honorable and straightforward in his dealings and attentive to business, and if you will from time to time send hides and skins to him, I hereby guarantee that he will not convert or misappropriate them, but will well and faithfully tan them, and, if he does not buy and pay you for them within the time agreed upon between you, I agree that he shall deliver them at Rose, McAlpine & Co., New York City, N. Y.

Notice of your acceptance is hereby waived.

JOSEPH KREKEY.

P. O. address: 248 Freeman St.

It was shown at the trial that the defendant was an illiterate man, who could not read nor write, except possibly to sign his name. That he signed the paper at the request of Thinnes when in a state of intoxication, and under a false representation that it was an application for a license under the excise law. The principal part of the instrument was in print, probably prepared by the plaintiff, or under his direction. At all events it was presented to the defendant by Thinnes, the representations as to its character were made by him, and when he procured the defendant's signature, he sent it the plaintiff, who so far as appears, never met or had any personal transaction with the defendant. . . . If this instrument had been a negotiable promissory note the defendant's liability to the plaintiff would depend upon the question of negligence and there does not appear to be any sound reason for a different rule in this case. Chapman v. Rose, 56 N. Y. 137; Whitney v. Snyder, 2 Lans. 477; National Exchange Bank v. Veneman, 43 Hun, 241; Fenton v. Robinson, 4 Id. 252."

was brought, and at the trial the judge charged the jury, in effect, that, if the defendant was by the fraud of the agent led to believe that he was signing his name only for the purpose of showing how it was spelled, then he was not bound. The court also refused to charge that, if the defendant by his own negligence in any way contributed to the perpetration of the fraud, he could not set up the defense of fraud. The circumstances of the second suit are substantially the same, except that, instead of being asked to sign his name in order to show how it was spelled, the defendant was requested to sign his name as an autograph to be used with the sketch of his life. The defendants have obtained verdicts and judgments, the plaintiff insists that the cases were wrongly submitted to the jury, in the respects above indicated. The plaintiff does not claim that, in the absence of negligence, the fraudulent representations implied in the requests made by the agent were insufficient to defeat the alleged contracts, but he urges that as the defendants were able to read, and had the printed papers placed in their hands, they had no right to act upon the representations, but were bound to inform themselves of the purport of the documents, and that their negligence on this point should preclude the proposed defense.

No doubt, there are many decisions which hold that, under certain circumstances, a person may be debarred by his negligence from defeating what appears to be his contract, on the ground of fraud. Some of these decisions rest upon the desirability of preserving general confidence in commercial paper; others upon the legal maxim, *"Caveat emptor"*; others upon the equitable doctrine that, when one of two persons otherwise innocent must suffer, he should suffer whose negligence has allowed the loss to occur; and still others upon the rule of evidence, that, when contracting parties execute a writing supposed to express their contract, that writing becomes the conclusive proof of the terms of their agreement, and hence there is cast upon the parties a stringent duty to inform themselves of the real meaning of the instrument signed.

The last two classes approach the case in hand, but neither of them includes it. In the first place, the defendants did not know they were signing contracts, and therefore were not called upon to exercise that vigilance which such a transaction reasonably demands. They were doing acts which were not intended to have, and, if the representations of the agent had been honest, could not have, any obligatory force or legal effect whatever, and as to which, consequently, there was no legal duty of care. In the second place, the plaintiff does not stand in the position of an innocent person. As assignee, he is entitled only to the rights of his assignor; and the assignor is, in legal contemplation, implicated in the fraud of the agent, so far as relates to the enforcement of the alleged contracts from which the defendants have

hitherto accepted no benefit. Said Mr. Justice Story in his work on Agency (section 139), it is a "sound and perfectly well-settled principle that, if a principal seeks to enforce a contract made by his agent, he is as much bound by any material misrepresentation made therein by the agent as if made by himself." *A fortiori,* it would seem, a person cannot enforce as a contract that which in truth never was intended to have even the form of a contract, but which has assumed such a form through the fraud of his agent. We know of no just principle, nor have we been referred to any judicial decision, sanctioning the notion that, in circumstances like these before us, a person can, out of the fraud of his own agent and the negligence of a third party, create a contract legally binding upon the latter.

Our conclusion, therefore, is that there was no error in submitting these cases to the jury, and that the judgment should be affirmed.

9 Cyc. 390–391 (61–62); W. P. 583 (27); 585 (30).

(iii.) Mistake as to the identity of the person with whom the contract is made.

BOSTON ICE CO. *v.* POTTER.

123 MASSACHUSETTS, 28.—1877.

Contract on an account annexed, for ice sold and delivered between April 1, 1874, and April 1, 1875. Answer, a general denial. Judgment for defendant. Plaintiff alleged exceptions.

ENDICOTT, J. To entitle the plaintiff to recover, it must show some contract with the defendant. There was no express contract, and upon the facts stated no contract is to be implied. The defendant had taken ice from the plaintiff in 1873, but, on account of some dissatisfaction with the manner of supply, he terminated his contract, and made a contract for his supply with the Citizens' Ice Company. The plaintiff afterward delivered ice to the defendant for one year without notifying the defendant, as the presiding judge has found, that it had bought out the business of the Citizens' Ice Company, until after the delivery and consumption of the ice.

The presiding judge has decided that the defendant had a right to assume that the ice in question was delivered by the Citizens' Ice Company, and has thereby necessarily found that the defendant's contract with that company covered the time of the delivery of the ice.

There was no privity of contract established between the plaintiff and defendant, and without such privity the possession and use of the property will not support an implied assumpsit. Hills v. Snell, 104 Mass. 173, 177. And no presumption of assent can be implied from the reception and use of the ice, because the defendant had no knowl-

edge that it was furnished by the plaintiff, but supposed that he received it under the contract made with the Citizens' Ice Company. Of this change he was entitled to be informed.

A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract, as when he contracts with another to paint a picture, or write a book, or furnish articles of a particular kind, or when he relies upon the character or qualities of an individual, or has, as in this case, reasons why he does not wish to deal with a particular party. In all these cases, as he may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into. If the defendant, before receiving the ice, or during its delivery, had received notice of the change, and that the Citizens' Ice Company could no longer perform its contract with him, it would then have been his undoubted right to have rescinded the contract and to decline to have it executed by the plaintiff. But this he was unable to do, because the plaintiff failed to inform him of that which he had a right to know. Orcutt v. Nelson, 1 Gray, 536, 542; Winchester v. Howard, 97 Mass. 303; Hardman v. Booth, 1 H. & C. 803; Humble v. Hunter, 12 Q. B. 310; Robson v. Drummond, 2 B. & Ad. 303. If he had received notice and continued to take the ice as delivered, a contract would be implied. Mudge v. Oliver, 1 Allen, 74; Orcutt v. Nelson, *ubi supra;* Mitchell v. Lapage, Holt N. P. 253.

There are two English cases very similar to the case at bar. In Schmaling v. Thomlinson (6 Taunt. 147) a firm was employed by the defendants to transport goods to a foreign market, and transferred the entire employment to the plaintiff, who performed it without the privity of the defendants, and it was held that he could not recover compensation for his services from the defendants.

The case of Boulton v. Jones (2 H. & N. 564) was cited by both parties at the argument. There the defendant, who had been in the habit of dealing with one Brocklehurst, sent a written order to him for goods. The plaintiff, who had on the same day bought out the business of Brocklehurst, executed the order without giving the defendant notice that the goods were supplied by him and not by Brocklehurst. And it was held that the plaintiff could not maintain an action for the price of the goods against the defendant. It is said in that case that the defendant had a right of set-off against Brocklehurst, with whom he had a running account, and that is alluded to in the opinion of Baron Bramwell, though the other judges do not mention it.

The fact that a defendant in a particular case has a claim in set-off against the original contracting party shows clearly the injustice of forcing another person upon him to execute the contract without his

consent, against whom his set-off would not be available. But the actual existence of the claim in set-off cannot be a test to determine that there is no implied assumpsit or privity between the parties. Nor can the non-existence of a set-off raise an implied assumpsit. If there is such a set-off, it is sufficient to state that as a reason why the defendant should prevail; but it by no means follows that because it does not exist the plaintiff can maintain his action. The right to maintain an action can never depend upon whether the defendant has or has not a defense to it.

The implied assumpsit arises upon the dealings between the parties to the action, and cannot arise upon the dealings between the defendant and the original contractor, to which the plaintiff was not a party. At the same time, the fact that the right of set-off against the original contractor could not, under any circumstances, be availed of in an action brought upon the contract by the person to whom it was transferred and who executed it, shows that there is no privity between the parties in regard to the subject matter of this action.

It is, therefore, immaterial that the defendant had no claim in set-off against the Citizens' Ice Company.

We are not called upon to determine what other remedy the plaintiff has, or what would be the rights of the parties if the ice were now in existence.

Exceptions overruled.

9 Cyc. 403 (19–20); W. P. 591 (c); 16 H. L. R. 381; 20 H. L. R. 424; Costigan, The doctrine of Boston Ice Co. v. Potter, 7 C. L. R. 32.

EDMUNDS *v.* MERCHANTS' DESPATCH TRANSP. CO.

135 MASSACHUSETTS, 283.—1883.

Three actions of tort, with counts in contract, against a common carrier, to recover the value of goods intrusted to it for carriage to Dayton, Ohio. Verdict for plaintiffs; defendant alleges exceptions.

MORTON, C. J. These three cases were tried together. In some features they resemble the case of Samuel v. Cheney [135 Mass. 278]. In other material features they differ from it. They also in some respects differ from each other. In two of the cases a swindler, representing himself to be Edward Pape of Dayton, Ohio, who is a reputable and responsible merchant, appeared personally in Boston, and bought of the plaintiffs the goods which are the subject of the suits respectively. In those cases, we think it clear, upon principle and authority, that there was a sale, and the property in the goods passed to the purchaser. The minds of the parties met and agreed upon all the terms of the sale, the thing sold, the price and time of payment, the person selling, and the person buying. The fact that the seller

was induced to sell by fraud of the buyer made the sale voidable, but not void. He could not have supposed that he was selling to any other person; his intention was to sell to the person present, and identified by sight and hearing; it does not defeat the sale because the buyer assumed a false name, or practiced any other deceit to induce the vendor to sell.

In Cundy v. Lindsay, 3 App. Cas. 459, 464, where the question was whether a man, who in good faith had bought chattels of a swindler who had obtained possession of them by fraud, could hold them against the former owner, Lord Chancellor Cairns states the rule to be that, "if it turns out that the chattel has come into the hands of the person who professed to sell it, by a *de facto* contract—that is to say, a contract which has purported to pass the property to him from the owner of the property, there the purchaser will obtain a good title."

In the cases before us, there was a *de facto* contract, purporting, and by which the plaintiffs intended, to pass the property and possession of the goods to the person buying them; and we are of opinion that the property did pass to the swindler who bought the goods. The sale was voidable by the plaintiffs; but the defendant, the carrier by whom they were forwarded, had no duty to inquire into its validity. The person who bought them, and who called himself Edward Pape, owned the goods, and upon their arrival in Dayton had the right to demand them of the carrier. In delivering them to him, the carrier was guilty of no fault or negligence. It delivered them to the person who bought and owned them, who went by the name of Edward Pape, and thus answered the direction upon the packages, and who was the person to whom the plaintiffs sent them. Dunbar v. Boston & Providence Railroad, 110 Mass. 26. The learned judge who tried the cases in the Superior Court based his charge upon a different view of the law; and, as the three cases were tried together, there must be a new trial in each.

It seems to have been assumed that the same questions are raised in each case. It is proper that we should add that the third case differs materially from the others. In that case, the contract did not purport, nor the plaintiffs intend, to sell to the person who was present and ordered the goods. The swindler introduced himself as a brother of Edward Pape of Dayton, O., buying for him. By referring to the mercantile agency, he tacitly represented that he was buying for the Edward Pape who was there recorded as a man of means. The plaintiffs understood that they were selling, and intended to sell, to the real Edward Pape. There was no contract made with him, because the swindler who acted as his agent had no authority, but there was no contract of sale made with any one else. The relation of vendor and vendee never existed between the plaintiffs and the swindler. The property in the goods, therefore, did not pass

to the swindler; and the defendant cannot defend, as in the other cases, upon the ground that it has delivered the goods to the real owner. Hardman v. Booth, 32 L. J. (N. S.) Ex. 105; Kingsford v. Merry, 26 L. J. (N. S.) Ex. 83; Barker v. Dinsmore, 72 Penn. St. 427.

Whether the defendant has any other justification or excuse for delivering the goods to the swindler is a question not raised by this bill of exceptions, and not considered at the trial; and therefore we cannot express an opinion upon it.

Exceptions sustained.[1]

9 Cyc. 402 (18); W. P. 592 (42); 718 (45); 6 Mich. L. R. 184; Ashley, in his Mutual assent in contract, 3 C. L. R. 71.

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[1] In Douglass v. Scott, 130 N. Y. Appellate Division, 322, the action was brought to recover damages for the alleged conversion of 135 bushels of buckwheat. The complaint alleged that the defendant falsely and fraudulently represented to the plaintiff that he was the agent for "Hewett Bros."; that the plaintiff relied upon the representation and was thereby induced to part with and deliver to the defendant 135 bushels of buckwheat of the value of $110; that the representation was false, and was then known to be false, and was made by the defendant with intent to deceive and defraud the plaintiff; that the defendant, having so obtained the possession of the buckwheat from the plaintiff, unlawfully converted and disposed of it to his own use. "Wherefore plaintiff demands judgment against the defendant for $110 damages for the wrongful taking and detention of said buckwheat, with interest thereon from the 15th day of November, 1907." The court held:

"The ordinary rule undoubtedly is that, where a party seeks to rescind a contract on the ground of fraud, he must tender a return of what he has received under it before he can maintain an action at law; but that is not this case. The plaintiff does not claim that he was induced by fraud to make a contract with the defendant, nor does he seek to rescind or avoid a contract obtained by fraud, but to recover the value of property obtained by fraud. The claim of the plaintiff is that he did not assent to a sale to the defendant, and that the agreement with him was a nullity. The important and material allegation of the complaint is that the defendant secured possession of the property in question by artifice and fraud, and converted it to his own use, and we must assume that the justice so found. This case is therefore not within the rule laid down in Gould v. Cayuga County Nat. Bank, 86 N. Y. 75, and kindred cases, cited by the learned county judge in support of his position. It is an action for the wrongful conversion of property obtained from the owner by fraud. The wrongdoer, in such a case, is not entitled to a return of the amount paid by him to effectuate his fraud and obtain possession of the property. The law cares very little what a fraudulent party's loss may be and exacts nothing for his sake. Masson v. Bovet, 1 Denio, 74, 43 Am. Dec. 651."

As to the evidence of the identity of a party contracting over the telephone, see Wells v. Silverman, 125 N. Y. Supplement, 457; 11 Col. L. Rev. 182.

(iv.) Mistake as to the subject matter.

a. Mistake of identity as to the thing contracted for.

KYLE *v.* KAVANAGH.

103 MASSACHUSETTS, 356.—1869.

Contract to recover the price of land sold and conveyed to the defendant, pursuant to the following agreement:

"Boston, July 2, 1868. I hereby agree to sell to E. Kavanagh four lots of land in Waltham on Prospect Street, so called, for 50 shares of Mitchell Granite stock, 9000 shares of Revenue Gold stock, also $150 in lawful money for said land. Said Kyle is to give said Kavanagh a good title, if the title is in said Kyle, so he can give deed; if said Kyle cannot give a good title, then this agreement is null and void."

The defendant contended and introduced evidence tending to show that, either by the fraud or misrepresentation of the plaintiff, or by mistake, the land conveyed by the deed was not the land which he bargained for, and that what he had agreed to purchase was a lot of land on another Prospect Street in Waltham, in no way connected with that mentioned in the deed, and a long way off; and he also contended that he was entitled to a warranty deed. Verdict for defendant.

MORTON, J. . . . The other exception taken by the plaintiff cannot be sustained. The instructions given were, in substance, that, if the defendant was negotiating for one thing and the plaintiff was selling another thing, and their minds did not agree as to the subject matter of the sale, there would be no contract by which the defendant would be bound, though there was no fraud on the part of the plaintiff. This ruling is in accordance with the elementary principles of the law of contracts, and was correct. Spurr v. Benedict, 99 Mass. 463.

Exception sustained.[1]

9 Cyc. 398 (8); W. P. 599 (53).

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[1] (To the ruling as to defendant's right to a warranty deed.) In Hazard v. New England Marine Ins. Co. (1 Sumner, 218), Mr. Justice Story charged that if in a policy of insurance the insured used the term "coppered ship" in one sense and the underwriter in another, "plainly it would be a contract founded in mutual mistake; and therefore neither party would be bound by it. They would not have contracted *ad idem*. There would never have been an agreement to the same subject matter in the same sense. This principle is so well known and so familiar, that it may now be deemed to be treasured up among the elements of jurisprudence."

b. Mistake as to the existence of the thing contracted for.

GIBSON *v.* PELKIE.

37 MICHIGAN, 380.—1877.

Assumpsit.

GRAVES, J. The right Gibson asserts is based solely on an alleged special agreement entitling him to collect so much as he might of a specific judgment, and to retain one-half of the sum collected. According to his own statement of his case, the judgment was the exclusive subject matter of the agreement relied on. No other demand or form of demand entered into the bargain. The parties had nothing else in their minds. They did not assume to contract about an unliquidated claim or an unadjudicated cause of action, the enforcement of which in Pelkie's name might involve him in a much larger liability than would be likely to attend the collection of a judgment. It was a judgment which formed the subject matter of the bargain. Such was the claim made by the declaration and such was the case in issue. No other ground for recovery appears. Now, there was no proof of a judgment; but there was evidence concerning one, and it seems to have been in effect conceded that there was something which had been taken to be a judgment, but which was so defective that it could not avail anything.

The case must be viewed as it is. It is not admissible to arbitrarily admit one part and reject another. If what there is to show that the supposed judgment was void is rejected, then all there is to make out the existence of any such judgment will be stricken out, and if that be done, there will be no proof whatever of the essence of the cause of action set up. There will be no showing that there was any subject matter for the alleged agreement, and no proof to maintain the actual averments of the declaration. The cause is presented here by both sides upon the theory that there was something which was intended as a judgment, but which was void and hence uncollectible, and the plaintiff in error cannot ask a more favorable view of the record. If, then, there was a proceeding which was meant to be a judgment, but which was void, there was nothing to which the actual bargaining could attach. There was no subject matter. The parties supposed there was a judgment, and negotiated and agreed on that basis, but there was none. Where they assumed there was substance, there was no substance. They made no contract because the thing they supposed to exist, and the existence of which was indispensable to the institution of the contract, had no existence. Allen v. Hammond, 11 Pet. 63; Suydam v. Clark, 2 Sandf. Sup'r Court Rep. 133; Gove v. Wooster, Lalor's Supp. to Hill & Den. 30; Smidt v. Tiden, L. R. 9 Q. B. 446;

9 Eng. 379; Couturier v. Hastie, 5 H. L. 673; Hazard v. New England Ins. Co., 1 Sumn. 218; Silvernail v. Cole, 12 Barb. 685; Sherman v. Barnard, 19 Barb. 291; Metcalf on Cont. 30, 31; 1 Poth. Ob. by Evans, 113; Benjamin on Sales, §§ 76, 77, ch. 4; 2 Kent. Com. 468. It is therefore the opinion of a majority of the court that the judgment in Pelkie's favor ought not to be disturbed.

Judgment is affirmed with costs.

9 Cyc. 399–401 (10–12); W. P. 612 (71).

SHERWOOD *v.* WALKER.

66 MICHIGAN, 568.—1887.

MORSE, J. Replevin for a cow. Suit commenced in justice's court. Judgment for plaintiff. Appealed to Circuit Court of Wayne County, and verdict and judgment for plaintiff in that court. The defendants bring-error, and set out twenty-five assignments of the same.

The main controversy depends upon the construction of a contract for the sale of the cow. The plaintiff claims that the title passed, and bases his action upon such claim. The defendants contend that the contract was executory, and by its terms no title to the animal was acquired by plaintiff.

The defendants reside at Detroit, but are in business at Walkerville, Ontario, and have a farm at Greenfield, in Wayne County, upon which were some blooded cattle supposed to be barren as breeders. The Walkers are importers and breeders of polled Angus cattle.

The plaintiff is a banker living at Plymouth, in Wayne County. He called upon the defendants at Walkerville for the purchase of some of their stock, but found none there that suited him. Meeting one of the defendants afterwards, he was informed that they had a few head upon this Greenfield farm. He was asked to go out and look at them, with the statement at the time that they were probably barren, and would not breed.

May 5, 1886, plaintiff went out to Greenfield and saw the cattle. A few days thereafter, he called upon one of the defendants with the view of purchasing a cow, known as "Rose 2d of Aberlone." After considerable talk, it was agreed that defendants would telephone Sherwood at his home in Plymouth in reference to the price. The second morning after this talk he was called up by telephone, and the terms of the sale were finally agreed upon. He was to pay five and one-half cents per pound, live weight, fifty pounds shrinkage. He was asked how he intended to take the cow home, and replied that he might ship her from King's cattle-yard. He requested defendants to confirm the sale in writing, which they did by sending him the following letter:

"WALKERVILLE, May 15, 1886.

"T. C. SHERWOOD, President, etc.

"Dear Sir,—We confirm sale to you of the cow, Rose 2d of Aberlone, lot 56 of our catalogue, at five and a half cents per pound, less fifty pounds shrink. We enclose herewith order on Mr. Graham for the cow. You might leave check with him, or mail to us here, as you prefer.

"Yours truly,

"HIRAM WALKER & SONS."

The order upon Graham enclosed in the letter read as follows:

"WALKERVILLE, May 15, 1886.

"GEORGE GRAHAM,—You will please deliver at King's cattle-yard to Mr. T. C. Sherwood, Plymouth, the cow Rose 2d of Aberlone, lot 56 of our catalogue. Send halter with cow, and have her weighed.

"Yours truly,

"HIRAM WALKER & SONS."

On the twenty-first of the same month the plaintiff went to defendants' farm at Greenfield, and presented the order and letter to Graham, who informed him that the defendants had instructed him not to deliver the cow. Soon after, the plaintiff tendered to Hiram Walker, one of the defendants, $80, and demanded the cow. Walker refused to take the money or deliver the cow. The plaintiff then instituted this suit.

After he had secured possession of the cow under the writ of replevin, the plaintiff caused her to be weighed by the constable who served the writ, at a place other than King's cattle-yard. She weighed 1420 pounds.

When the plaintiff, upon the trial in the Circuit Court, had submitted his proofs showing the above transaction, defendants moved to strike out and exclude the testimony from the case, for the reason that it was irrelevant, and did not tend to show that the title to the cow passed, and that it showed that the contract of sale was merely executory. The court refused the motion, and an exception was taken.

The defendants then introduced evidence tending to show that at the time of the alleged sale it was believed by both the plaintiff and themselves that the cow was barren and would not breed; that she cost $850, and if not barren would be worth from $750 to $1000; that after the date of the letter, and the order to Graham, the defendants were informed by said Graham that in his judgment the cow was with calf, and therefore they instructed him not to deliver her to plaintiff, and on the twentieth of May, 1886, telegraphed to the plaintiff what Graham thought about the cow being with calf, and that consequently they could not sell her. The cow had a calf in the month of October following.

On the nineteenth of May the plaintiff wrote Graham as follows:

"PLYMOUTH, May 19, 1886.

"MR. GEORGE GRAHAM, Greenfield.

"Dear Sir,—I have bought Rose or Lucy from Mr. Walker, and will be there for her Friday morning, nine or ten o'clock. Do not water her in the morning.

"Yours, etc.,

"T. C. SHERWOOD."

Plaintiff explained the mention of the two cows in this letter by testifying that, when he wrote this letter, the order and letter of defendants were at his house, and, writing in a hurry, and being uncertain as to the name of the cow, and not wishing his cow watered, he thought it would do no harm to name them both, as his bill of sale would show which one he had purchased. Plaintiff also testified that he asked defendants to give him a price on the balance of their herd at Greenfield, as a friend thought of buying some, and received a letter dated May 17, 1886, in which they named the price of five cattle, including Lucy at $90, and Rose 2d at $80. When he received the letter he called defendants up by telephone, and asked them why they put Rose 2d in the list, as he had already purchased her. They replied that they knew he had, but thought it would make no difference if plaintiff and his friend concluded to take the whole herd.

The foregoing is the substance of all the testimony in the case.

The circuit judge instructed the jury that if they believed the defendants, when they sent the order and letter to plaintiff, meant to pass the title to the cow, and that the cow was intended to be delivered to plaintiff, it did not matter whether the cow was weighed at any particular place, or by any particular person; and if the cow was weighed afterwards, as Sherwood testified, such weighing would be a sufficient compliance with the order; if they believed that defendants intended to pass the title by the writing, it did not matter whether the cow was weighed before or after suit brought, and the plaintiff would be entitled to recover.

The defendants submitted a number of requests, which were refused. The substance of them was that the cow was never delivered to plaintiff, and the title to her did not pass by the letter and order; and that under the contract, as evidenced by these writings, the title did not pass until the cow was weighed and her price thereby determined; and that, if the defendants only agreed to sell a cow that would not breed, then the barrenness of the cow was a condition precedent to passing title, and plaintiff cannot recover. The court also charged the jury that it was immaterial whether the cow was with calf or not. It will therefore be seen that the defendants claim that, as a matter of law, the title to this cow did not pass, and that the circuit judge erred in submitting the case to the jury, to be determined by them, upon the intent of the parties as to whether or not the title passed with the sending of the letter and order by the defendants to the plaintiff. . . .

The following cases in this court support the instruction of the court below as to the intent of the parties governing and controlling the question of a completed sale, and the passing of title: Lingham v. Eggleston, 27 Mich. 324; Wilkinson v. Holiday, 33 Id. 386; Grant v. Merchants' and Manufacturers' Bank, 35 Id. 527; Carpenter v. Graham, 42 Id. 194; Brewer v. Michigan Salt Ass'n, 47 Id. 534; Whitcomb v. Whitney, 24 Id. 486; Byles v. Colier, 54 Id. 1; Scotten v. Sutter, 37 Id. 526, 532; Ducey Lumber Co. v. Lane, 58 Id. 520, 525; Jenkinson v. Monroe Bros. & Co., 61 Id. 454.

It appears from the record that both parties supposed this cow was barren and would not breed, and she was sold by the pound for an insignificant sum as compared with her real value if a breeder. She was evidently sold and purchased on the relation of her value for beef, unless the plaintiff had learned of her true condition, and concealed such knowledge from the defendants. Before the plaintiff secured possession of the animal, the defendants learned that she was with calf, and therefore of great value, and undertook to rescind the sale by refusing to deliver her. The question arises whether they had a right to do so.

The circuit judge ruled that this fact did not avoid the sale, and it made no difference whether she was barren or not. I am of the opinion that the court erred in this holding. I know that this is a close question, and the dividing line between the adjudicated cases is not easily discerned. But it must be considered as well settled that a party who has given an apparent consent to a contract of sale may refuse to execute it, or he may avoid it after it has been completed, if the assent was founded, or the contract made, upon the mistake of a material fact,—such as the subject matter of the sale, the price, or some collateral fact materially inducing the agreement; and this can be done when the mistake is mutual. 1 Benj. Sales, §§ 605, 606; Leake, Cont. 339; Story, Sales (4th ed.), §§ 148, 377. See also Cutts v. Guild, 57 N. Y. 229; Harvey v. Harris, 112 Mass. 32; Gardner v. Lane, 9 Allen, 492; S. C., 12 Allen, 44; Huthmacher v. Harris' Am'rs, 38 Penn. St. 491; Byers v. Chapin, 28 Ohio St. 300; Gibson v. Pelkie, 37 Mich. 380, and cases cited; Allen v. Hammond, 11 Pet. 63, 71.

If there is a difference or misapprehension as to the substance of the thing bargained for, if the thing actually delivered or received is different in substance from the thing bargained for and intended to be sold, then there is no contract; but if it be only a difference in some quality or accident, even though the mistake may have been the actuating motive to the purchaser or seller, or both of them, yet the contract remains binding.

"The difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole contract, going, as it were, to the root of the matter, or only to some point, even though a material point,

an error as to which does not affect the substance of the whole consideration." Kennedy v. Panama &c. Mail Co., L. R. 2 Q. B. 580, 588.

It has been held, in accordance with the principles above stated, that where a horse is bought under the belief that he is sound, and both vendor and vendee honestly believe him to be sound, the purchaser must stand by his bargain, and pay the full price, unless there was a warranty.

It seems to me, however, in the case made by this record, that the mistake or misapprehension of the parties went to the whole substance of the agreement. If the cow was a breeder, she was worth at least $750; if barren, she was worth not over $80. The parties would not have made the contract of sale except upon the understanding and belief that she was incapable of breeding, and of no use as a cow. It is true she is now the identical animal that they thought her to be when the contract was made; there is no mistake as to the identity of the creature. Yet the mistake was not of the mere quality of the animal, but went to the very nature of the thing. A barren cow is substantially a different creature than a breeding one. There is as much difference between them for all purposes of use as there is between an ox and a cow that is capable of breeding and giving milk. If the mutual mistake had simply related to the fact whether she was with calf or not for one season, then it might have been a good sale; but the mistake affected the character of the animal for all time, and for her present and ultimate use. She was not in fact the animal, or the kind of animal, the defendants intended to sell or the plaintiff to buy. She was not a barren cow, and, if this fact had been known, there would have been no contract. The mistake affected the substance of the whole consideration, and it must be considered that there was no contract to sell, or sale of the cow as she actually was. The thing sold and bought had in fact no existence. She was sold as a beef creature would be sold; she is in fact a breeding cow, and a valuable one.

The court should have instructed the jury that if they found that the cow was sold, or contracted to be sold, upon the understanding of both parties that she was barren, and useless for the purpose of breeding, and that in fact she was not barren, but capable of breeding, then the defendant had a right to rescind, and to refuse to deliver, and the verdict should be in their favor.

The judgment of the court below must be reversed, and a new trial granted, with costs of this court to defendants.

Campbell, C. J., and Champlin, J., concurred. Sherwood, J., dissented.

9 Cyc. 397 (4); 399–401 (10–12); W. P. 606 (65); 612 (71).

HECHT *v.* BATCHELLER.

147 MASSACHUSETTS, 335.—1888.

Contract for money had and received. Judgment for plaintiff. Defendants appeal.

MORTON, C. J. The defendants, being the owners of a promissory note which they had taken in the ordinary course of business, sold it through brokers to the plaintiffs. It was afterwards ascertained that, two hours before this sale, the makers of the note had made a "voluntary assignment of all their assets for the benefit of their creditors, to be administered under the insolvent laws of Ohio," of which State they were residents. Neither of the parties to this suit, nor the brokers employed by the defendants, knew of the assignment at the time of the sale, but they all supposed that the makers were doing business as theretofore. The plaintiffs contend that they are entitled to recover upon either of two grounds: first, that there was a mutual mistake of the parties as to the thing sold, and therefore no contract was completed between them; and, secondly, that there was a warranty express or implied, by the defendants, that the makers of the note were then carrying on business, and had not failed or made an assignment.

It is a general rule, that, where parties assume to contract, and there is a mistake as to the existence or identity of the subject matter, there is no contract, because of the want of the mutual assent necessary to create one; so that, in the case of a contract for the sale of personal property, if there is such mistake, and the thing delivered is not the thing sold, the purchaser may refuse to receive it, or, if he receives it, may upon discovery of the mistake return it, and recover back the price he has paid. But to produce this result the mistake must be one which affects the existence or identity of the thing sold. Any mistake as to its value or quality, or other collateral attributes, is not sufficient if the thing delivered is existent, and is the identical thing in kind which was sold. Gardner v. Lane, 9 Allen, 492; Gardner v. Lane, 12 Allen, 39; Spurr v. Benedict, 99 Mass. 463; Bridgewater Iron Co. v. Enterprise Ins. Co., 134 Mass. 433; Benjamin on Sales, § 54.

In the case at bar, the subject matter of the contract was the note of J. and S. B. Sachs. The note delivered was the same note which the parties bought and sold. They may both have understood that the makers were solvent, whereas they were insolvent; but such a mistake or misapprehension affects the value of the note and not its identity. Day v. Kinney, 131 Mass. 37. In Day v. Kinney, the makers of the note sold were in fact insolvent, but they had not stopped payment or been adjudged insolvent, and the decision is confined to the facts of the case. But we think the same principles apply in this case. The

makers of the note had made an assignment for the benefit of their creditors, but this did not extinguish the note, or destroy its identity. It remained an existing note, capable of being enforced, with every essential attribute going to its nature as a note which it had before. Its quality and value were impaired, but not its identity. The parties bought and sold what they intended, and their mistake was not as to the subject matter of the sale, but as to its quality. We are therefore of opinion that the sale was valid, and that the plaintiffs cannot recover the amount they paid, as upon a failure of consideration.

. . . . . .

We think the principles we have stated are decisive of the case before us. The defendants sold the note in good faith. So far as the evidence shows, neither party, at the time of the sale, spoke of, or inquired about, or knew anything about, the failure of the makers. They stood upon an equal footing, and they had equal means of knowing the standing of the makers. It was understood that the defendants were selling the note without recourse to them. They did not expressly warrant the value of the note, and we are of the opinion that from the circumstances no warranty could fairly be inferred of the solvency of the makers, or that they continued to do business.

We are therefore of opinion, . . . upon the facts of the case, the court was not justified in finding for the plaintiffs.

Exceptions sustained.

9 Cyc. 395 (86-89); W. P. 606 (65); 654 (5).

WOOD *v.* BOYNTON.

64 WISCONSIN, 265.—1885.

TAYLOR, J. This action was brought in the Circuit Court for Milwaukee County to recover the possession of an uncut diamond of the alleged value of $1000. The case was tried in the Circuit Court and, after hearing all the evidence in the case, the learned circuit judge directed the jury to find a verdict for the defendants. The plaintiff excepted to such instruction, and, after a verdict was rendered for the defendants, moved for a new trial upon the minutes of the judge. The motion was denied, and the plaintiff duly excepted, and, after judgment was entered in favor of the defendants, appealed to this court.

The defendants are partners in the jewelry business. On the trial it appeared that on and before the 28th of December, 1883, the plaintiff was the owner of and in the possession of a small stone of the nature and value of which she was ignorant; that on that day she sold it to one of the defendants for the sum of one dollar. Afterwards it was ascertained that the stone was a rough diamond, and of the value of about $700. After learning this fact the plaintiff tendered the de-

fendants the one dollar, and ten cents as interest, and demanded a return of the stone to her. The defendants refused to deliver it, and therefore she commenced this action.

The plaintiff testified to the circumstances attending the sale of the stone to Mr. Samuel B. Boynton, as follows:

"The first time Boynton saw that stone he was talking about buying the topaz, or whatever it is, in September or October. I went into his store to get a little pin mended, and I had it in a small box,—the pin, a small earring, . . . this stone, and a broken sleeve-button were in the box. Mr. Boynton turned to give me a check for my pin. I thought I would ask him what the stone was, and I took it out of the box and asked him to please tell me what that was. He took it in his hand and seemed some time looking at it. I told him I had been told it was a topaz, and he said it might be. He says, 'I would buy this; would you sell it?' I told him I did not know but what I would. What would it be worth? And he said he did not know; he would give me a dollar and keep it as a specimen, and I told him I would not sell it; and it was certainly pretty to look at. He asked me where I found it, and I told him in Eagle. He asked about how far out, and I said right in the village, and I went out. Afterwards, and about the 28th of December, I needed money pretty badly, and thought every dollar would help, and I took it back to Mr. Boynton and told him I had brought back the topaz, and he says, 'Well, yes; what did I offer you for it?' and I says, 'One dollar'; and he stepped to the change drawer and gave me the dollar, and I went out."

In another part of her testimony she says:

"Before I sold the stone I had no knowledge whatever that it was a diamond. I told him that I had been advised that it was probably a topaz, and he said probably it was. The stone was about the size of a canary bird's egg, nearly the shape of an egg, worn pointed at one end; it was nearly straw color, a little darker."

She also testified that before this action was commenced she tendered the defendants $1.10, and demanded the return of the stone, which they refused. This is substantially all the evidence of what took place at and before the sale to the defendants, as testified to by the plaintiff herself. She produced no other witness on that point.

The evidence on the part of the defendant is not very different from the version given by the plaintiff, and certainly is not more favorable to the plaintiff. Mr. Samuel B. Boynton, the defendant to whom the stone was sold, testified that at the time he bought this stone, he had never seen an uncut diamond; had seen cut diamonds, but they are quite different from the uncut ones; "he had no idea this was a diamond, it never entered his brain at the time." Considerable evidence was given as to what took place after the sale and purchase, but the evidence has very little, if any, bearing upon the main point in the case.

This evidence clearly shows that the plaintiff sold the stone in question to the defendants, and delivered it to them in December, 1883, for a consideration of one dollar. The title to the stone passed by the

sale and delivery to the defendants. How has that title been divested and again vested in the plaintiff? The contention of the learned counsel for the appellant is that the title became vested in the plaintiff by the tender to the Boyntons of the purchase money, with interest, and a demand of a return of the stone to her. Unless such tender and demand revested the title in the appellant, she cannot maintain her action.

The only question in the case is whether there was anything in the sale which entitled the vendor (the appellant) to rescind the sale and so revest the title in her. The only reasons we know of for rescinding a sale and revesting the title in the vendor so that he may maintain an action at law for the recovery of the possession against his vendee are, (1) that the vendee was guilty of some fraud in procuring a sale to be made to him; (2) that there was a mistake made by the vendor in delivering an article which was not the article sold, a mistake in fact as to the identity of the thing sold with the thing delivered upon the sale. This last is not in reality a rescission of the sale made, as the thing delivered was not the thing sold, and no title ever passed to the vendee by such delivery.

In this case, upon the plaintiff's own evidence, there can be no just ground for alleging that she was induced to make the sale she did by any fraud or unfair dealings on the part of Mr. Boynton. Both were entirely ignorant at the time of the character of the stone and of its intrinsic value. Mr. Boynton was not an expert in uncut diamonds, and had made no examination of the stone, except to take it in his hand and look at it before he made the offer of one dollar, which was refused at the time, and afterwards accepted without any comment or further examination made by Mr. Boynton. The appellant had the stone in her possession for a long time, and it appears from her own statement that she had made some inquiry as to its nature and qualities. If she chose to sell it without further investigation as to its intrinsic value to a person who was guilty of no fraud or unfairness which induced her to sell it for a small sum, she cannot repudiate the sale because it is afterwards ascertained that she made a bad bargain. Kennedy v. Panama &c. Mail Co., L. R. Q. B. 580.

There is no pretense of any mistake as to the identity of the thing sold. It was produced by the plaintiff and exhibited to the vendee before the sale was made, and the thing sold was delivered to the vendee when the purchase price was paid. Kennedy v. Panama &c. Mail Co., L. R. 2 Q. B. 587; Street v. Blay, 2 Barn. & Adol. 456; Gompertz v. Bartlett, 2 El. & Bl. 849; Gurney v. Womersley, 4 El. & Bl. 133; Ship's Case, 2 De G., J. & S. 544. Suppose the appellant had produced the stone, and said she had been told that it was a diamond, and she believed it was, but had no knowledge herself as to its character or value, and Mr. Boynton had given her $500 for it, could he have

rescinded the sale if it had turned out to be a topaz or any other stone of very small value? Could Mrs. Boynton have rescinded the sale on the ground of mistake? Clearly not, nor could he rescind it on the ground that there had been a breach of warranty, because there was no warranty, nor could he rescind it on the ground of fraud, unless he could show that she falsely declared that she had been told it was a diamond, or, if she had been so told, still she knew it was not a diamond. See Street v. Blay, *supra*.

It is urged, with a good deal of earnestness, on the part of the counsel for the appellant, that, because it has turned out that the stone was immensely more valuable than the parties at the time of the sale supposed it was, such fact alone is a ground for the rescission of the sale, and that fact was evidence of fraud on the part of the vendee. Whether inadequacy of price is to be received as evidence of fraud, even in a suit in equity to avoid a sale, depends upon the facts known to the parties at the time the sale is made.

When this sale was made the value of the thing sold was open to the investigation of both parties; neither knew its intrinsic value, and, so far as the evidence in this case shows, both supposed that the price paid was adequate. How can fraud be predicated upon such a sale, even though after investigation showed that the intrinsic value of the thing sold was hundreds of times greater than the price paid? It certainly shows no such fraud as would authorize the vendor to rescind the contract and bring an action at law to recover the possession of the thing sold. Whether that fact would have any influence in an action in equity to avoid the sale, we need not consider. See Stettheimer v. Killip, 75 N. Y. 287; Etting v. Bank of U. S., 11 Wheat. 59.

We can find nothing in the evidence from which it could be justly inferred that Mr. Boynton, at the time he offered the plaintiff one dollar for the stone, had any knowledge of the real value of the stone, or that he entertained even a belief that the stone was a diamond. It cannot, therefore, be said that there was a suppression of knowledge on the part of the defendant as to the value of the stone which a court of equity might seize upon to avoid the sale. Following cases show that, in the absence of fraud or warranty, the value of the property sold, as compared with the price paid, is no ground for a rescission of a sale. Wheat v. Cross, 31 Md. 99; Lambert v. Heath, 15 Mees. & W. 487; Bryant v. Pember, 45 Vt. 487; Kuelkamp v. Hidding, 31 Wis. 503, 511.

However unfortunate the plaintiff may have been in selling this valuable stone for a mere nominal sum, she has failed entirely to make out a case either of fraud or mistake in the sale such as will entitle her to a rescission of such sale so as to recover the property sold in an action at law.

By the court. The judgment of the Circuit Court is affirmed.

9 Cyc. 395 (86–89); W. P. 606 (65); 19 H. L. R. 290.

SEARS *v.* GRAND LODGE OF THE ANCIENT ORDER OF UNITED WORKMEN.

163 NEW YORK, 374.—1900.

Appeal from a judgment of the Appellate Division, reversing a judgment in favor of plaintiff, and granting a new trial.

BARTLETT, J. This appeal presents rather a novel question.

On the 31st of July, 1886, one Charles R. Baumgrass, residing in the city of Syracuse, became a member of a subordinate lodge of defendant and received a certificate of membership, which provided in the event of his death the defendant would pay to his wife, Mary A. Baumgrass, the sum of $2000. On September 28, 1886, Baumgrass disappeared and was not seen or heard from thereafter until April 15, 1896, a period of nearly ten years. In the meantime important transactions and negotiations had taken place affecting the rights of the parties. Mrs. Baumgrass, the beneficiary, was advised to rest upon her rights until seven years had elapsed, when she might proceed under the legal presumption that her husband was dead. She waited about nine years and then brought an action against the defendant on the 23d of September, 1895, to recover $2000 under the certificate of insurance. On the 26th day of March, 1896, and before the action was tried, she entered into an agreement of compromise with the defendant, under which her suit against it was discontinued without costs. The agreement recited the facts and provided for the settlement and discontinuance of the action; that the defendant should pay to the beneficiary "the sum of $666 in cash promptly"; that said $666 "is not to be returned in any event"; that $1334 should be placed by defendant in the hands of a trustee to be held by him until July 1, 1897, subject to the condition that if before that time the defendant should produce reasonable proof that the insured was alive, the money so deposited was to be returned to it, but failing in such proof, it was to be paid to the beneficiary and, in the language of the agreement, "she shall take full title to the same." Twenty days after the execution of this agreement, and before defendant had made the absolute payment of $666 as agreed, the insured was proved to be alive. Thereupon the beneficiary demanded payment of the $666, which was refused, and she assigned her claim under the agreement of compromise to the plaintiff. The facts are undisputed; the Special Term rendered judgment for plaintiff, which was reversed by the Appellate Division with a divided court.

The defendant rests its defense on the legal proposition that the agreement on which the plaintiff seeks to recover was made while both parties thereto were laboring under a material mistake of fact, to wit, the supposed death of the insured, and is, therefore, unenforceable.

The counsel for the defendant has cited us to many authorities to the general effect that where parties to a contract have entered into it under the impression that a certain state of facts existed, which proved to be error, equity will afford relief. This is a sound proposition of law, but it has no application to the facts in this case.

The material facts may be briefly stated. The insured disappeared absolutely, leaving his wife as beneficiary under his certificate of insurance issued by the defendant; she waited nine years and then sued to recover the total insurance of $2000. In this situation the defendant seeks a compromise. It is not unreasonable to assume that the defendant regarded the chances of success in the litigation as decidedly in favor of the plaintiff; the legal presumption arising at the end of seven years, that the insured was dead, had existed for two years. What then was there to compromise in the action then pending? Clearly but one thing was dealt with or could be in the agreement of settlement, to wit, the possibility that the insured should prove to be alive. That this was the basis of compromise upon which the agreement rested is perfectly apparent on the face of the instrument. The defendant said to the beneficiary, give us sixteen months more time to prove the insured is alive and discontinue your suit at once. If you do this, we will make you a cash payment of $666, which is not to be paid back in any event, and, at the expiration of the sixteen months, if we fail to prove the insured is alive, we will pay you $1334, which is to be held for both of us by a trustee meanwhile, and, if we do prove it, the money is to be returned to us. It is urged that there is no consideration for this agreement. The discontinuance of action, the extension of time in which defendant was to pay the insurance, and the compromise of a doubtful claim, were a sufficient consideration.

It is also urged that the trial judge found that when the agreement was entered into, both parties believed the insured was dead. It was also found that notwithstanding such belief the contract recognized, contemplated, and provided for the possibility of the insured being alive. It is to be kept in mind that the present action is limited to the cash payment that was to have been made under the agreement, and in regard to which the defendant was in default at the time it was discovered that the insured was alive. This payment should have been made when the contract was signed, and it was then distinctly agreed that it should not be paid back "in any event," which meant it should not be repaid even if it were subsequently proved that the insured was alive.

In view of all the circumstances, it cannot be said that the parties entered into the agreement laboring under a mutual mistake of fact. Mr. Pomeroy in his work on Equity Jurisprudence (§ 855, 2d ed.) states the correct rule governing this case. "Where parties have entered into a contract or arrangement based upon uncertain or con-

tingent events purposely as a compromise of a doubtful claim arising from them, and where parties have knowingly entered into a speculative contract or transaction, one in which they intentionally speculated as to the result, and there is in either case an absence of bad faith, violation of confidence, misrepresentation, concealment, and other inequitable conduct mentioned in a former paragraph, if the facts upon which such agreement or transaction was founded or the event of the agreement itself turned out very differently from what was expected or anticipated, this error, miscalculation, or disappointment, although relating to a matter of fact and not of law, is not such a mistake within the meaning of the equitable doctrine as entitles the disappointed party to any relief either by way of canceling the contract and rescinding the transaction, or of defense to a suit brought for its enforcement. In such classes of agreements and transactions the parties are supposed to calculate the chances and they certainly assume the risks." Again, in section 849, Mr. Pomeroy, after dealing with relief where a party is mistaken as to his legal rights, interests, or relations, closes with these words: "It should be carefully observed that this rule has no application to compromises, where doubts have arisen as to the rights of the parties and they have intentionally entered into an arrangement for the purpose of compromising and settling those doubts. Such compromises, whether involving mistakes of law or fact, are governed by special considerations." A number of instructive authorities are cited by the learned author under both of these sections.

It may be observed in this connection that the trial court found that there was no fraud on the part of the beneficiary, and, substantially, that she had acted throughout in good faith. The agreement was in furtherance of a lawful compromise, and enforceable without regard to the validity of the beneficiary's claim under the original certificate of insurance. Compromises of disputed claims fairly entered into are final, and will be sustained by the courts without regard to the validity of the claims. Wehrum v. Kuhn, 61 N. Y. 623; White v. Hoyt, 73 N. Y. 505; Dunham v. Griswold, 100 N. Y. 224; Crans v. Hunter, 28 N. Y. 389; Mowatt v. Wright, 1 Wend. 355. The defendant, in executing the agreement of compromise, assumed the risk and calculated the chances of being placed in the present situation, and there would seem to be no reason in law or public policy why plaintiff should not recover. It would be a harsh rule, indeed, that would preclude insurer and beneficiary nine years after the insured had disappeared from entering into an enforceable agreement of compromise under the state of facts here disclosed.

The judgment of the Appellate Division should be reversed and the judgment of the Trial Term affirmed, with costs to the plaintiff in all the courts.

PARKER, C. J., MARTIN, VANN, CULLEN, and WERNER, JJ., concur; GRAY, J., dissents.

Judgment reversed, etc.[1]

9 Cyc. 398 (6); 401 (16); 345 (25); W. P. 214 (23); 614 (74).

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c. Mistake of one party, known to the other.

MUMMENHOFF *et al. v.* RANDALL.

19 INDIANA APPELLATE COURT, 44.—1898.

HENLEY, J. On the 1st day of October, 1894, the appellee, residing at Oxford, Mich., sent through the mail the following letter: "Oxford, Mich., Oct. 1st, 1894. Mummenhoff Co., Indianapolis, Ind.—Gentlemen: Can we not get to doing some business? I quote you the following low price on potatoes, either in straight cars or in mixed, part of each kind of vegetables. Would quote you potatoes at 35 cts., ruta-bagas, 25 cts., 62 No. carrots, 35 cts., 55 No. onions, either red or yellow. The carrots are both long and yellow. The price on delivered track Indianapolis. My certified weights guaranteed within 2 per cent. Yours truly, C. L. Randall, per N. B." This letter was dictated by appellee to a stenographer, who wrote the same out on a typewriter, and by the mistake and inadvertence of the stenographer in typewriting the same from her stenographic notes she wrote in said letter the price of potatoes at 35 cts. per bushel, instead of the price of 55 cts., as was dictated to her by appellee.

[1] In Riegel v. American Life Ins. Co., 153 Pa. St. 134, a creditor had a life insurance policy on the life of his debtor for $6000, the annual premium being $153.90. For thirteen years the whereabouts of the debtor were unknown and as the payment of the premiums became burdensome, the creditor took a paid-up policy for $2500 in lieu of the $6000 policy. The creditor supposed the debtor to be then living; the Insurance Company issued a policy for the amount to which the creditor was entitled, assuming the insured debtor to be still living. In fact, unknown to either party, the insured had died about ten days before the old policy was canceled and the new one issued. The creditor brought an action to reinstate the old policy and the court held (two judges dissenting) that there was a mutual mistake of a material fact, that both parties proceeded upon the assumption that the insured was still living and that the element of doubt as to whether he was living or dead did not enter into the transaction.

An elaborate discussion of such mistake of fact as will warrant the rescission of a contract is found in Kowalke v. Milwaukee Ry., 103 Wis. 472, where the mistake alleged was as to the fact of pregnancy of a woman at the time of a release of a claim for damages for injury to her; and the question was whether the release was executed under mutual mistake of fact, or whether the element of doubt was itself a part of the subject matter of the release and the contract itself made with the understanding that each party took his chances as to whether or not the fact existed.

This letter was received by appellants at Indianapolis, Ind., on the 2d day of October, 1894, and appellants at once sent to appellee an order by mail as follows: "Indianapolis, Oct. 2nd, 1894. Mr. C. L. Randall, Oxford, Mich.—Dear Sir: We are in receipt of your favor of the 1st inst. Please ship us 2 or 3 cars of potatoes at your earliest convenience, at price quoted. If you have good stock, we shall give you a good many of our orders. Resp'y, Mummenhoff & Co."

Appellee, upon the receipt of the said order, and being ignorant of the mistake of the stenographer, as before set out, accepted appellants' order as being an order for the number of cars of potatoes mentioned by appellants, and as being at the price of 55 cents per bushel, and on the 3d day of October, 1894, shipped to appellants one car of potatoes containing 405½ bushels, and at the same time transmitted by mail to appellants at Indianapolis, Ind., a bill therefor, in which bill the appellants were charged with the number of bushels of potatoes shipped at 55 cents per bushel. Two days afterwards—on the 5th day of October, 1894—appellee shipped to appellants still another car of potatoes containing 417⅚ bushels, and transmitted by mail at the same time to the appellants a statement of such shipment, in which the appellants were charged with the amount of the potatoes therein shipped at 55 cents per bushel. On the 6th day of October, 1894, appellants, having received the bills covering the two shipments of October 3d and 4th, and finding that the potatoes were therein charged to them at 55 cents, telegraphed to appellee as follows: "Indianapolis, Ind., Oct. 6, 1894. To C. L. Randall, Oxford, Mich.: You offered potatoes thirty-five, billed at fifty-five. Explain. Mummenhoff & Co." The receipt of this message by appellee was his first knowledge of the mistake of his stenographer in the letter of October 2d, and, neither car of potatoes having yet arrived at Indianapolis, their destination, appellee immediately telegraphed appellants as follows: "October 6th, 1894. To Mummenhoff & Co., Indianapolis, Ind.: My quotation was fifty-five cents delivered. Potatoes cost forty-five here. Second car on road. If can't use as billed, will give directions. C. L. Randall." Notwithstanding appellee's telegram, appellants received, accepted, and used the two cars of potatoes, and, knowing that the quotation of 35 cents in the letter of October 2d was a mistake, refuse to settle upon any basis other than 35 cents per bushel.

Appellee began this action against appellants in the lower court, basing his first paragraph of complaint upon the facts as we have detailed them. The second paragraph of complaint demanded the reasonable value of the potatoes alleged to have been sold and delivered to appellants at their special instance and request. Appellants demurred to the first paragraph of complaint. The paragraph was held sufficient. An answer of three paragraphs was filed, to each of

which appellee demurred. The lower court sustained the demurrer to the second paragraph of answer. There was a trial, and a finding for appellee, and, over appellants' motion for a new trial, judgment was rendered in favor of appellee. Appellants' assignment of errors brings before this court for review the rulings of the lower court upon the demurrer to the first paragraph of complaint, the demurrer to the second paragraph of answer, and the overruling of the motion for a new trial.

The demurrer to the first paragraph of appellee's complaint was properly overruled. Under the allegations of this paragraph of complaint the minds of the contracting parties never met upon a proposition to sell potatoes at 35 cents per bushel, because it is alleged that the price was a mistake, and that it was so understood by appellants, to whom it was made. "As mutual assent is necessary to the formation of a contract (*i. e.*, of sale), it follows that an error or mistake of facts in that which goes to the essence of the agreement, and therefore excludes such assent, prevents the formation of the contract, since each party is really agreeing to something different, notwithstanding the apparent mutual assent." 21 Am. & Eng. Enc. Law, 459. We think it is plain that there was no contract by appellee to sell the potatoes at 35 cents per bushel, and the complaint alleges that appellants knew, when they received the offer, that it was a mistake; they knew that appellee had not, in fact, offered the potatoes at that price; and appellants, in their letter ordering the potatoes to be shipped "at price quoted," failed to mention to appellee the price that had been quoted; consequently it cannot be said that appellee, in acting upon appellants' order, in any way adopted the price so mistakenly quoted. But, under the allegations of the complaint, appellants afterwards became liable to appellee for the potatoes at 55 cents per bushel, because appellants received the potatoes as their property after being notified of the mistake in the quotation, and after notice of the price at which they must receive them, or not receive at all. If appellants had received the potatoes, and disposed of them in ignorance of the mistake made in the quotation, or, knowing of the mistaken quotation, had not been informed of the price expected by appellee, an entirely different case would be presented from the one presented by the first paragraph of the complaint.

The second paragraph of answer was clearly insufficient, and for that reason alone the objection that the demurrer was not in proper form cannot avail the appellants. Blue v. Bank, 145 Ind. 518, 43 N. E. 655; Field v. Brown, 146 Ind. 293, 45 N. E. 464. . . .

Judgment affirmed.[1]

9 Cyc. 396 (97); W. P. 606 (64).

[1] In Shelton v. Ellis, 70 Ga. 297, plaintiff was employed to compile a rate sheet for the W. & A. Ry., showing cost of tickets between different points

DAVIS *v.* REISINGER.

120 N. Y. APPELLATE DIVISION, 766.—1907.

HOUGHTON, J. The action is to recover damages for failure to deliver 1,000 bags of rice sold by description and sample. On May 13, 1903, the defendant solicited the plaintiff to buy, and on that day he purchased, 250 bags of "Bassein rice like sample AA" to arrive, at .0255 per pound; and, having sold this invoice at an advance, three days later he purchased another lot of 250 bags at the same price, which lot he also sold. On the 19th day of May he purchased 500 bags more at .0260. The sample upon which the trades were made was not Bassein rice, but Java rice, which is a superior grade, and always commands a higher price in the market. A mistake had been made by some one in preparing the sample, and when the first lot was purchased neither the plaintiff nor the defendant was aware of it, for neither was familiar with the two kinds of rice. From the evidence it may also, perhaps, be inferred that when the second lot was purchased the plaintiff did not know of the mistake, although he appreciated he was getting a very good bargain. As to the first lot, and possibly as to the second lot, plaintiff and defendant dealt on an equal footing, neither knowing the sample was not Bassein rice, and defendant must be held to his bargain to deliver the rice which the sample called for. When the last purchase of 500 bags was made, however, it is manifest from the evidence that the plaintiff had learned of the defendant's mistake, and knew or had reason to believe that the sample was Java rice, and not Bassein rice, which the defendant mistakenly supposed it to be. When this last contract was made, therefore, the plaintiff knew that defendant had made a mistake respecting the sample, and was offering a high-grade and high-priced rice for sale at the price of a low or medium grade rice, which he supposed, from the description of "Bassein," he was selling.

The plaintiff cannot recover any damages under a contract entered into under such circumstances; for, having knowledge of the mistake under which defendant was laboring, it would be a fraud on his part to take advantage of it. The plaintiff, as early as when he resold the

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By mistake he printed the fare from Atlanta, Georgia, to Rogers, Arkansas, as $21.25, when it should have been $36.70. Defendant discovered the mistake, and immediately purchased of the ticket agent of the W. & A. Ry. a large number of the tickets at the price printed in the rate sheet. Plaintiff, being responsible to the railway for the error, offered to return defendant's money and demanded the tickets, which offer and demand were refused by defendant. Plaintiff alleged in his bill that defendant knew that a mistake had been made in the rate sheet and fraudulently took advantage of it. A temporary injunction was granted to restrain defendant from disposing of the tickets, and a receiver was appointed to hold them.

first lot of 250 bags, was told by an expert that the sample looked like Java rice; and he says several men in the trade talked of the fact that Java rice was being sold for Bassein rice between his first and last purchases. From the facts appearing, the extent of plaintiff's recovery should be his damages on his first and second purchases, and nothing for his last purchase of 500 bags. . . .

The judgment and order should be reversed, and a new trial granted, with costs to the appellant to abide the event.

McLaughlin, J. (dissenting). I dissent. The sale was by sample, and the rice from which the sample was taken was in existence. The plaintiff is entitled to the benefit of his contract. He acted honorably with, and did not practice a fraud upon, the defendant, and has recovered no more than he is entitled to. He offered the best proof as to damages which was available.

The judgment is right, and should be affirmed.

Misrepresentation.

(*i.*) *Misrepresentation distinguished from fraud.*

Note.—For cases under this topic, see the cases on "Effects of Misrepresentation," *post*, p. 305, and on "Knowledge of Falsity," *post*, p. 338.

(*ii.*) *Representations distinguished from terms.*

DAVISON *v.* VON LINGEN.

113 UNITED STATES, 40.—1884.

Libel *in personam*, in admiralty, against the owners of the steamer Whickham, to recover damages for breach of charter-party. Cross-libel *in personam* against the charterers for damages for breach of charter-party.

The charter-party was executed at Philadelphia on August 1, 1879, and provided that the steamship Whickham "now sailed or about to sail from Benizaf with cargo for Philadelphia, . . . with liberty to take outward cargo to Philadelphia for owner's benefit, shall, with all convenient speed, sail and proceed to Philadelphia or Baltimore, at charterers' option, after discharge of inward cargo at Philadelphia, or as near thereunto as she may safely get, and there load afloat from said charterers, or their agents, a full and complete cargo of grain and (or) other lawful merchandise." The owners had submitted a charter-party in which the vessel was described as "sailed from, or loading at, Benizaf," but this the charterers declined to accept, and the charter-party was executed with the description "now sailed or

about to sail from Benizaf." In fact the vessel was then loading at Benizaf, and did not sail until August 7th. On the 9th the charterers learned that she had that day passed Gibraltar, and being satisfied that she would not arrive in time to load in August, procured another vessel, which they loaded at an increased rate of freight, as favorable as possible. The Whickham discharged her cargo at Philadelphia on September 7th and was tendered to the charterers at Baltimore on the 11th. The charterers declined to accept her on the ground that she had neither sailed nor was about to sail from Benizaf on August 1st. Another charter was then obtained at a loss, on as favorable terms as possible, and for this loss the owners filed the cross-libel.

It further appeared that all parties understood that the charterers wanted a vessel which could load in August; that they had asked a guaranty that the Whickham would arrive in time, but this was refused; that the basis of the belief that the Whickham would arrive rested on telegraphic information from Gibraltar, a day's sail from Benizaf.

Decree for cross-libellants in District Court, which was reversed in the Circuit Court and a decree entered for the libellants.

Mr. Justice Blatchford. . . . The decision of the Circuit Court proceeded on the ground that the language of the charter-party must be interpreted, if possible, as the parties in Baltimore understood it when they were contracting. In view of the facts, that all the contracting parties understood that the vessel was wanted to load in August, that, as soon as the charterers learned that she did not leave Gibraltar until the 9th, they took steps to get another vessel, and that they declined to sign a charter-party which described the vessel as "sailed from, or loading at, Benizaf," the court held that the language of the charter-party meant that the vessel had either sailed, or was about ready to sail, with cargo; and that the vessel was not in the condition she was represented, being not more than three-elevenths loaded.

The argument for the appellants is, that the words of the charter-party "about to sail with cargo" imply that the vessel has some cargo on board but is detained from sailing by not having all on board, and that she will sail, when, with dispatch, all her cargo, which is loading with dispatch, shall be on board; and that this vessel fulfilled those conditions. As to the attendant circumstances at Baltimore, it is urged that the charterers asked for a guaranty that the vessel would arrive in time for their purposes, and it was refused, and that the printed clause as to an option in the charterers to cancel was stricken out, and that then the charterers accepted the general words used.

The words of the charter-party are, "now sailed, or about to sail, from Benizaf, with cargo for Philadelphia." The word "loading" is not found in the contract. The sentence in question implies that the vessel is loaded, because the words "with cargo" apply not only to the

words "about to sail," but to the words "sailed," and as, if the vessel had "sailed with cargo," she must have had her cargo on board, so, if it is agreed she is "about to sail with cargo," the meaning is, that she has her cargo on board, and is ready to sail. This construction is in harmony with all that occurred between the parties at the time, and with the conduct of the charterers afterwards. The charterers wanted a guaranty that, even if the vessel had already sailed, or whenever she should sail, she would arrive in time for them to load her with grain in August. This was refused, and the charterers took the risk of her arriving in time, if she had sailed, or if, having her cargo then on board, she should, as the charter-party says, "with all convenient speed, sail and proceed to Philadelphia or Baltimore." Moreover, the charterers refused to sign a charter-party with the words "sailed from, or loading at, Benizaf," and both parties agreed on the words in the charter-party, which were the words of authority used by the agents in Philadelpia of the owners of the vessel. The erasing of the printed words, as to the option of cancelling, was in harmony with the refusal of the owners to guarantee the arrival by a certain day. So, also, when the charterers learned, on the 9th of August, that the vessel did not leave Gibraltar till that day, they proceeded to look for another vessel. It was then apparent that the vessel had not left Benizaf by the 1st of August, or with such reasonable dispatch thereafter, that she could have had her cargo on board, ready to sail on the 1st of August.

That the stipulation in the charter-party, that the vessel is "now sailed, or about to sail, from Benizaf, with cargo, for Philadelphia," is a warranty, or a condition precedent, is, we think, quite clear. It is a substantive part of the contract, and not a mere representation, and is not an independant agreement, serving only as a foundation for an action for compensation in damages. A breach of it by one party justifies a repudiation of the contract by the other party, if it has not been partially executed in his favor. The case falls within the class of which Glaholm v. Hays (2 Man. & Gr. 257), Ollive v. Booker (1 Exch. 416), Oliver v. Fielden (4 Exch. 135), Gorrissen v. Perrin (2 C. B. N. S. 681), Croockewit v. Fletcher (1 H. & N. 893), Seeger v. Duthie (8 C. B. N. S. 45), Behn v. Burness (3 B. & S. 751), Corkling v. Massey (L. R. 8 C. P. 395), and Lowber v. Bangs (2 Wall. 728) are examples; and not within the class illustrated by Tarrabochia v. Hickie, 1 H. & N. 183; Dimech v. Corlett, 12 Moore P. C. 199; and Clipsham v. Vertue, 5 Q. B. 265. It is apparent, from the averments in the pleadings of the charterers, of facts which are established by the findings, that time and the situation of the vessel were material and essential parts of the contract. Construing the contract by the aid of, and in the light of, the circumstances existing at the time it was made, averred in the pleadings and found as facts, we have no diffi-

culty in holding the stipulation in question to be a warranty. See Abbott on Shipping, 11th ed. by Shee, pp. 227, 228. But the instrument must be construed with reference to the intention of the parties when it was made, irrespective of any events afterwards occurring; and we place our decision on the ground that the stipulation was originally intended to be, and by its term imports, a condition precedent. The position of the vessel at Benizaf, on the 1st of August—the fact that, if she had not then sailed, she was laden with cargo, so that she could sail—these were the only data on which the charterers could make any calculation as to whether she could arrive so as to discharge and reload in August. They rejected her as loading; but if she was in such a situation, with cargo in her, that she could be said to be "about to sail," because she was ready to sail, they took the risk as to the length of her voyage.

The decree of the Circuit Court is affirmed.

9 Cyc. 410 (59); W. P. 655 (10).

(*iii.*) *Effects of misrepresentation.*

a. In contracts generally.

WILCOX *v.* IOWA WESLEYAN UNIVERSITY.

32 IOWA, 367.–1871.

Action to foreclose a mortgage executed by defendant college to secure a promissory note. Defense, accord and satisfaction of note and mortgage, in consideration of certain lands agreed by defendant to be given and by plaintiff to be taken as payment. Plaintiff sets up that he was induced to enter such agreement by the false representations of defendant as to the location, character, and value of the land. Such representations are found to be in fact false, but also that the agent of the defendant made them in good faith, believing each piece of land to be as described.

A decree was entered by the trial court cancelling the note and mortgage and releasing defendant from all liability thereon. Plaintiff appeals.

MILLER, J. . . . Is the plaintiff entitled to be relieved from his agreement compounding his claim against defendant, and, if so, to what extent?

The appellee cites Holmes v. Clark (10 Iowa, 423), which holds, that in order to sustain an action on the ground of false and fraudulent representations in the sale of land, it must be shown that the representations were false and fraudulent within the knowledge of the party making them; and he argues that appellant is, in view of the

law, without remedy in this case. The rule laid down in that case is well established and universally followed in all actions *at law* for damages sustained by false and fraudulent representations in a sale (see cases cited by appellant in that case); but equity will grant relief on the ground of fraud, although the party representing a material fact made the assertion *without knowing* whether it was true or not. The consequences to the person who acted on the faith of the representations are the same whether he who made them knew them to be false or was ignorant whether they were true or not. And if the representations were made to influence the conduct of another party in a matter of business, and they did influence him to his prejudice, equity will interfere and grant him relief. Williard's Eq. Jur. 150; Ainslie v. Medlycott, 9 Ves. 21; Harding v. Randall, 15 Me. 332; Smith v. Richards, 13 Pet. 38; Turnbull v. Gadsden, 2 Strobh. (S. C.) Eq. 14; McFerran v. Taylor, 3 Cranch, 281.

And even if by mistake, and innocently, a party misrepresents a material fact, upon which another party is induced to act, it is as conclusive a ground of relief in equity as a wilful and false assertion. Taylor v. Ashton, 11 Mees. & Wels. 400; Foster v. Charles, 6 Bing. 396.

Now it is entirely clear, from the evidence, that the plaintiff was thus induced to act in this case. The lots were represented to be of particular situations and values, when they were in fact otherwise; and while the agent informed plaintiff that he had never seen the lots himself, and did not make the representations from his own knowledge, yet he did what was, substantially, the same thing, by stating what the donors said in respect to their situations and values, and that he (the agent) knew one of the donors, whom he represented to be a smart business man and a leading member of the church, whose statements could be relied upon. Through the representations and persuasions of the agent, the plaintiff generously donated or agreed to donate forty per centum of his claim to the university, and receive in payment of the balance real property at cash prices. This he was, in equity and conscience, entitled to receive. He selected the two lots before mentioned upon the representations of the agent, relying entirely, as he had a right to do under the circumstances, thereon respecting the situation and value of the same. The lots were not as represented. They were represented by the agent to be worth, in the aggregate, the sum of $1000, whereas they were worth less than one-fifth that sum. Under these circumstances the plaintiff is clearly entitled to equitable relief from so unconscionable a bargain. Nor do we think, under all the circumstances of the case, that he has lost his right to relief by any delay or laches on his part. And as, by his agreement, he was to receive land at cash prices, to the extent of sixty per centum of his claim, which the university has failed to pay or con-

vey to him, he will be entitled to recover the money instead of these lots, according to his contract entered into June 6, 1861, viz.: $1000 with six per centum interest from that date, upon reconveying the lots to the university or to whom it shall direct.

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The judgment of the District Court is reversed, and the cause will be remanded for further proceedings not inconsistent with this opinion, or the appellant may, if he so elect, have final judgment in this court.

Reversed.[1]

9 Cyc. 408–409 (49–50); 38 L. R. A. (N. S.) 301, 303, 306; Williston, Liability for honest misrepresentation, 24 H. L. R. 415.

SCHOOL DIRECTORS *v.* BOOMHOUR.

83 ILLINOIS, 17.—1876.

Action for damages for breach of contract. Verdict for plaintiff, from which defendants appeal.

SCOTT, J. The finding and judgment of the court are plainly and manifestly against the weight of evidence, and so palpable is the error, the judgment, for that cause, must be reversed. When plaintiff applied to defendants to teach their district school, they distinctly informed him it was conditionally engaged to Miss Swartz, and if she succeeded in getting a certificate of qualification that week at the teachers' institute, then in session at Lena, she was to have the school; but he assured them she could not get a certificate, for the reason, as he "understood, there would be no examination for teachers that week." Other testimony is much stronger, but this is plaintiff's own statement, and in that he was clearly mistaken. One object in holding the institute, as stated by the county superintendent of schools, was, that an examination of teachers might be had, and, he states, public announcement was made that such examination would take place. Plaintiff was present at that meeting of the institute, but whether he heard the announcement or not, the superintendent does not know. That such examination would be held was a matter of public

[1] In Martin v. Hill, 41 Minn. 337 the court said: "That one who, making a purchase, does not get by it substantially what, from the false representations of the vendor as to material facts, he had a right to believe, and does believe he is purchasing, may have a rescission of the contract of purchase, if he is guilty of no laches, is beyond question. It would be the grossest injustice to hold a party to a purchase, where, solely through the fault of the other party, he gets only what he did not intend to buy. And to this right of rescission it is not essential that the false representations were made with actual intent to defraud. The right is not based on actual fraud, but on a material mistake of facts caused by the fault of the other party."

notoriety, and as it was of special interest to those assembled, it must have been the subject of conversation.

The fact is uncontroverted, Miss Swartz was at that session of the institute, was examined, and received the usual certificate of qualification. On presenting it to defendants, they gave her the school, according to their original agreement with her, and refused to allow plaintiff to teach, and so notified him at once by letter. In this they did right. Plaintiff's employment was induced either by a misrepresentation or a misapprehension of facts, and he could not demand the performance of his alleged contract. Defendants were misled by the erroneous information communicated by plaintiff, and he will not be permitted to make his wrongful conduct a ground of an action in his favor. Whether his representations of facts were wilfully or innocently untrue, is a question about which we need express no opinion. The effect is the same, whether he knew they were untrue or not.

Legally, Miss Swartz was entitled to the benefit of her contract with defendants, and they never would have negotiated with plaintiff concerning the school had it not been for his representation she could not obtain the requisite certificate. On these principal facts there is absolutely no conflict in the testimony. It is all one way. There is not a shadow of justice in the claim put forth by plaintiff, and in no view that can be taken, can he be permitted to recover.

The judgment of the court below will be reversed.

Judgment reversed.

9 Cyc. 408-409 (47-50); 411 (62-63); W. P. 678 (47); 25 H. L. R. 383.

WOODRUFF & CO. *v.* SAUL.

70 GEORGIA, 271.—1883.

Action on an account. Defense, composition and release. Judgment for defendant.

Plaintiffs appeal.

Plaintiffs sued defendant on an account, and in reply to the defense of composition and release, set up that the agreement was procured by the false representations of the defendant.

CRAWFORD, J. . . . The error complained of in the charge given, is that the debtor must know his representations to be false, to make the settlement void. It is thoroughly well settled by the common law that the misrepresentation of a material fact, made by one of the parties to a contract, though made by mistake and innocently, if acted

on by the opposite party, constitutes legal fraud. Story's Eq., 191 *et seq.;* Kerr on Fraud and Mistake, 53 *et seq.;* 6 Ga. 458.

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Judgment reversed.[1]

9 Cyc. 408–409 (47–50); 411 (62–63); W. P. 378 (10).

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b. In contracts uberrimæ fidei.

WALDEN *v.* LOUISIANA INSURANCE CO.

12 LOUISIANA, 134.—1838.

MARTIN, J. The plaintiff is appellant from a judgment, which rejected his claim for the value of a house, insured by the defendants, and which was destroyed by fire.

The facts of the case are these: A ropewalk, which was so contiguous to the house, that the destruction of the former by fire, must necessarily have involved the latter in the like calamity; it was rumored, that an attempt had been made to set fire to the ropewalk,

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[1] *Remedies for misrepresentation.*—In the United States equitable relief is generally granted in the case of contracts induced by innocent false representation: Johnston v. Bent, 93 Ala. 160; Lockridge v. Foster, 5 Ill. 569; (but see Tone v. Wilson, 81 Ill. 529; Prentice v. Crane, 234 Ill. 302; Gillispie v. Fulton Co., 236 Ill. 188; Stockhalm v. Adams, 96 Ill. App. 152;) Brooks v. Riding, 46 Ind. 15; Garden v. Mann, 36 Ind. App. 694; Wilcox v. Iowa Wesleyan University, 32 Ia. 367; Hunter v. League Safety Cure Co., 96 Ia. 573; Watson v. Stucker, 5 Dana (Ky.) 581; Pratt v. Philbrook, 33 Me. 17; Cochran v. Pascault, 54 Md. 1; Keene v. Demelman, 172 Mass. 17; Converse v. Blumrich, 14 Mich. 109; Beebe v. Young, 14 Mich. 136; Martin v. Hill, 41 Minn. 337; Isaacs v. Skrainka, 95 Mo. 517; Florida v. Morrison, 44 Mo. App. 529; Crowley v. Smyth, 46 N. J. L. 380; Crowe v. Lewin, 95 N. Y. 423; Tryon v. Lyon, 133 App. Div. 798; Garrett Co. v. Halsey, 38 Misc. (N. Y.) 438; Lynch's Appeal, 97 Pa. St. 349; Lewis v. McLemore, 10 Yerg. (Tenn.) 206; Singleton v. Houston, 79 S. W. (Tex.) 98; Adams v. Reed, 11 Utah 480; Twitchell v. Bridge, 42 Vt. 68; McMullin's Adm'r v. Sanders, 79 Va. 356; Smith v. Richards, 13 Pet. 26; Doggett v. Emerson, 3 Story (U. S.) 700; Simon v. Goodyear Metallic Rubber Shoe Co., 105 Fed. 573.

But relief at law is generally denied: Johnston v. Bent, 93 Ala. 160; Gregory v. Schoenell, 55 Ind. 101; Shook v. Singer Manufacturing Co., 61 Ind. 520; Scroggin v. Wood, 87 Ia. 497; King v. Mills, 10 Allen (Mass.), 548; Pike v. Fay, 101 Mass. 134.

However relief at law was granted in Woodruff v. Saul, 70 Ga. 271; School Directors v. Boomhour, 83 Ill. 17; Wickham v. Grant, 28 Kan. 517; Gunby v. Sluter, 44 Md. 237; McNeill v. Bank, 100 Miss. 271; Lynch v. Mercantile Trust Co., 18 Fed. 486. See 25 H. L. R. 383.

In Taylor v. Leith, 26 Oh. St. 428, it was held that no action in tort for deceit would lie for innocent false representation; but in Mulvey v. King, 39 Oh. St. 491, a counterclaim for damages based on innocent false representation was allowed to be interposed to an action for the price.

which induced the plaintiff to insure the house. The defendants resisted his claim, on the ground, that he had not communicated the circumstances, which had excited his alarm and determined him to insure.

It appears to us, the District Court did not err. The underwriter had an undoubted right to be informed of every circumstance, which, creating or increasing the risk against which insurance is sought, may induce him to decline the insurance, or demand a higher premium. It appears, from the plaintiff's own confession, that the attempt which had been made to set on fire a building, which could not have been consumed without materially endangering his house, created in him an alarm, which prompted him to guard against the danger.

It is true, he evidently acted in good faith; for when he called on the defendants for indemnification, he candidly informed them of the circumstance which had alarmed him. His ignorance of his duty cannot protect him against his omission to give information of a material fact, which the defendants had a right to know, in order to establish the proper rate of insurance.

It is therefore ordered, adjudged, and decreed that the judgment of the District Court be affirmed, with costs.

9 Cyc. 409 (52).

PHŒNIX LIFE INS. CO. *v.* RADDIN.

120 UNITED STATES, 183.—1887.

Action at law to recover upon a life insurance policy issued by defendant upon the life of plaintiff's son.

Judgment for plaintiff. Defendant appeals.

The policy contained a provision that, "if any of the declarations or statements made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue, this policy shall be null and void." Question 28 and the answer were as follows:

"28. Has any application been made to this or any other company for assurance on the life of the party? If so, with what result? What amounts are now assured on the life of the party, and in what companies? If already assured in this company, state the No. of the policy."

"$10,000, Equitable Life Assurance Society."

Defendant offered to prove that the assured, within three weeks before the application for the policy in suit, had made applications to

two other companies for insurance on the life of the insured, each of which had been declined. The court excluded the evidence and ruled, "that if the answer to one of the interrogatories of question 28 was true, there would be no breach of warranty; that the failure to answer the other interrogatories of question 28 was no breach of the contract; and that if the company took the defective application, it would be a waiver on their part of the answers to the other interrogatories of that question."

MR. JUSTICE GRAY. . . . The jury having returned a verdict for the plaintiff in the full amount of the policy, the defendant's exceptions to the refusal to rule as requested and to the rulings aforesaid present the principal question in the case.

The rules of law which govern the decision of this question are well settled, and the only difficulty is in applying those rules to the facts before us.

Answers to questions propounded by the insurers in an application for insurance, unless they are clearly shown by the form of the contract to have been intended by both parties to be warranties, to be strictly and literally complied with, are to be construed as representations, as to which substantial truth in everything material to the risk is all that is required of the applicant. Moulor v. American Ins. Co., 111 U. S. 335; Campbell v. New England Ins. Co., 98 Mass. 381; Thomson v. Weems, 9 App. Cas. 671.

The misrepresentation or concealment by the assured of any material fact entitles the insurers to avoid the policy. But the parties may by their contract make material a fact that would otherwise be immaterial, or make immaterial a fact that would otherwise be material. Whether there is other insurance on the same subject, and whether such insurance has been applied for and refused, are material facts, at least when statements regarding them are required by the insurers as part of the basis of the contract. Carpenter v. Providence Washington Ins. Co., 16 Pet. 495; Jeffries v. Life Ins. Co., 22 Wall. 47; Anderson v. Fitzgerald, 4 H. L. Cas. 484; Macdonald v. Law Union Ins. Co., L. R. 9 Q. B. 328; Edington v. Ætna Life Ins. Co., 77 N. Y. 564, and 100 N. Y. 536.

Where an answer of the applicant to a direct question of the insurers purports to be a complete answer to the question, any substantial misstatement or omission in the answer avoids a policy issued on the faith of the application. Cazenove v. British Equitable Assurance Co., 29 Law Journal (N. S.), C. P. 160, affirming S. C. 6 C. B. N. S. 437. But where upon the face of the application a question appears to be not answered at all, or to be imperfectly answered, and the insurers issue a policy without further inquiry, they waive the want or imperfection in the answer, and render the omission to answer more fully immaterial. Connecticut Ins. Co. v. Luchs, 108 U. S. 498; Hall

v. People's Ins. Co., 6 Gray, 185; Lorillard Ins. Co. v. McCulloch, 21 Ohio St. 176; American Ins. Co. v. Mahone, 56 Mississippi, 180; Carson v. Jersey City Ins. Co., 14 Vroom, 300, and 15 Vroom, 210; Lebanon Ins. Co. v. Kepler, 106 Penn. St. 28.

The distinction between an answer apparently complete, but in fact incomplete and therefore untrue, and an answer manifestly incomplete, and as such accepted by the insurers, may be illustrated by two cases of fire insurance, which are governed by the same rules in this respect as cases of life insurance. If one applying for insurance upon a building against fire is asked whether the property is incumbered, and for what amount, and in his answer discloses one mortgage, when in fact there are two, the policy issued thereon is avoided. Towne v. Fitchburg Ins. Co., 7 Allen, 51. But if to the same question he merely answers that the property is incumbered, without stating the amount of incumbrances, the issue of the policy without further inquiry is a waiver of the omission to state the amount. Nichols v. Fayette Ins. Co., 1 Allen, 63.

In the contract before us, the answers in the application are nowhere called warranties, or made part of the contract. In the policy those answers and the concluding paragraph of the application are referred to only as "the declarations or statements upon the faith of which this policy is issued"; and in the concluding paragraph of the application the answers are declared to be "fair and true answers to the foregoing questions," and to "form the basis of the contract for insurance." They must therefore be considered, not as warranties which are part of the contract, but as representations collateral to the contract, and on which it is based.

The 28th printed question in the application consists of four successive interrogatories, as follows: "Has any application been made to this or any other company for assurance on the life of the party? If so, with what result? What amounts are now assured on the life of the party, and in what companies? If already assured in this company, state the number of policy." The only answer written opposite this question is, "$10,000, Equitable Life Assurance Society."

The question being printed in very small type, the answer is written in a single line midway of the opposite space, evidently in order to prevent the ends of the letters from extending above or below that space; and its position with regard to that space, and to the several interrogatories combined in the question, does not appear to us to have any bearing upon the construction and effect of the answer.

But the four interrogatories grouped together in one question, and all relating to the subject of other insurance, would naturally be understood as all tending to one object, the ascertaining of the amount of such insurance. The answer in its form is responsive, not to the first and second interrogatories, but to the third interrogatory only, and

fully and truly answers that interrogatory by stating the existing amount of prior insurance and in what company, and thus renders the fourth interrogatory irrelevant. If the insurers, after being thus truly and fully informed of the amount and the place of prior insurance, considered it material to know whether any unsuccessful applications had been made for additional insurance, they should either have repeated the first two interrogatories, or have put further questions. The legal effect of issuing a policy upon the answer as it stood was to waive their right of requiring further answers as to the particulars mentioned in the 28th question, to determine that it was immaterial, for the purposes of their contract, whether any unsuccessful applications had been made, and to estop them to set up the omission to disclose such applications as a ground for avoiding the policy. The insurers, having thus conclusively elected to treat that omission as immaterial, could not afterwards make it material by proving that it was intentional.

The case of London Assurance v. Mansel (11 Ch. D. 363), on which the insurers relied at the argument, did not arise on a question including several interrogatories as to whether another application had been made, and with what result, and the amount of existing insurance, and in what company. But the application or proposal contained two separate questions; the first, whether a proposal had been made at any other office, and, if so, where; the second, whether it was accepted at the ordinary premuium, or at an increased premium, or declined; and contained no third question or interrogatory as to the amount of existing insurance, and in what company. The single answer to both questions was, "Insured now in two offices for £16,000 at ordinary rates. Policies effected last year." There being no specific interrogatory as to the amount of existing insurance, that answer could apply only to the question whether a proposal had been made, or to the question whether it had been accepted, and at what rates, or declined; and as applied to either of those questions it was in fact, but not upon its face, incomplete and therefore untrue. As applied to the first question, it disclosed only some and not all of the proposals which had in fact been made; and as applied to the second question, it disclosed only the proposals which had been accepted, and not those which had been declined, though the question distinctly embraced both. That case is thus clearly distinguished in its facts from the case at bar. So much of the remarks of Sir George Jessel, M. R., in delivering judgment, as implies that an insurance company is not bound to look with the greatest attention at the answers of an applicant to the great number of questions framed by the company or its agents, and that the intentional omission of the insured to answer a question put to him is a concealment which will avoid a policy issued

without further inquiry, can hardly be reconciled with the uniform current of American decisions.

For these reasons, our conclusion upon this branch of the case is that there was no error, of which the company had a right to complain, either in refusals to rule, or in the rulings made.

. . . . . .

The only objection remaining to be considered is that of variance between the declaration and the evidence, which is thus stated in the bill of exceptions: "After the plaintiff had rested, the defendant asked the court to rule that there was a variance between the declaration and the proof, inasmuch as the declaration stated the consideration of the contract to be the payment of the sum of $152.10 and of an annual premium of $304.20, while the policy showed the consideration to be the representations made in the application as well as payment of the aforesaid sums of money, and that an amendment to the declaration was necessary; but this the court declined to rule, to which the defendant excepted."

But the "consideration," in the legal sense of the word, of a contract is the *quid pro quo,* that which the party to whom a promise is made does or agrees to do in exchange for the promise. In a contract of insurance, the promise of the insurer is to pay a certain amount of money upon certain conditions; and the consideration on the part of the assured is his payment of the whole premium at the inception of the contract, or his payment of part then and his agreement to pay the rest at certain periods while it continues in force. In the present case, at least, the application is collateral to the contract, and contains no promise or agreement of the assured. The statements in the application are only representations upon which the promise of the insurer is based, and conditions limiting the obligation which he assumes. If they are false, there is a misrepresentation, or a breach of condition, which prevents the obligation of the insurer from ever attaching, or brings it to an end; but there is no breach of any contract or promise on the part of the assured, for he has made none. In short, the statements in this application limit the liability of the insurer, but they create no liability on the part of the assured. The expression at the beginning of the policy, that the insurance is made "in consideration of the representations made in the application for this policy," and of certain sums paid and to be paid for premiums, does not make those representations part of the consideration, in the technical sense, or render it necessary or proper to plead them as such.

Judgment affirmed.

9 Cyc. 409 (52).

c. Estoppel.

STEVENS *v.* LUDLUM.

46 MINNESOTA, 160.—1891.

Action brought in the municipal court of Minneapolis, the complaint alleging that defendant was engaged in business under the name of the "New York Pie Company," and that on December 20, 1889, plaintiff drew a bill of exchange for $100 upon the defendant under that name, which was on the same day accepted by him, the acceptance being signed "New York Pie Company, E. J. White, Mgr." The answer was a general denial. At the trial (before the court, without a jury) there was evidence tending to prove, and the court found, among other things, that the bill was drawn for the price of goods sold and delivered by plaintiff; that the goods were ordered by White in the name of the pie company, and, before delivering them, the plaintiff made inquiry at Bradstreet's and at Dun's commercial agencies (to which he was a subscriber), and was informed that the defendant was the proprietor of the business carried on in that name, and he relied on this information in making the sale; and that the information so given by the agencies had been received by them from defendant. Judgment was ordered for plaintiff, and the defendant appeals from an order refusing a new trial.

GILFILLAN, C. J. The facts found by the court below are sufficient to create an equitable estoppel against defendant as to the ownership of the concern doing business as the "New York Pie Company." To raise such an estoppel, it is not necessary that the representations should have been made with actual fraudulent intent. If he knows or ought to know the truth, and they are intentionally made under such circumstances as show that the party making them intended, or might reasonably have anticipated, that the party to whom they are made, or to whom they are to be communicated, will rely and act on them as true, and the latter has so relied and acted on them, so that to permit the former to deny their truth will operate as a fraud, the former is, in order to prevent the fraud, estopped to deny their truth. Coleman v. Pearce, 26 Minn. 123 (1 N. W. Rep. 846); Beebe v. Wilkinson, 30 Minn. 548 (16 N. W. Rep. 450). Nor need the representations be made directly to the party acting on them. It is enough if they were made to another, and intended or expected to be communicated as the representations of the party making them to the party acting on them, for him to rely and act on. "The representation may be intended for a particular individual alone, or for several, or for the public, or for any one of a particular class, or it may be made to A, to be communicated to B. Any one so intended by the party making

the representation will be entitled to relief or redress against him, by acting on the representation to his damage." Bigelow, Fraud, 445. If one act on a representation not made to nor intended for him, he will do so at his own risk. An instance of a right to act on a representation not made directly to the person acting on it, but intended for him if he had occasion to act on it, is furnished by Pence v. Arbuckle, 22 Minn. 417. The representations a business man makes to a bank or commercial agency, especially to the latter, relating to his business or to his pecuniary responsibility, are among those expected to be communicated to others for them to act on. The business of a commercial agency is to get such information as it can relative to the business and pecuniary ability of business men and business concerns, and communicate it to such of its patrons as may have occasion to apply for it. Any one making representations to such an agency, relating to his business or to the business of any concern with which he is connected, must know, must be held to intend, that whatever he so represents will be communicated by the agency to any patron who may have occasion to inquire. His representations are intended as much for the patrons of the agency, and for them to act on, as for the agency itself. When the representations so made are communicated, as those of the person making them, to a patron of the agency, and he relies and acts on them, he is in position to claim an estoppel.

The findings of fact in the case are fully sustained by the evidence.

Order affirmed.

16 Cyc. 749 (46); 20 Cyc. 70 (54).

Fraud.

(*i.*) *Essential features.*

a. Fraud is a false representation.

LAIDLAW *v.* ORGAN.

2 WHEATON (U. S.), 178.—1817.

Petition or libel for the possession of one hundred and eleven hogsheads of tobacco, and for the sequestration of the same pending the final decision of the court. Answer by defendants disclaiming any interest in the tobacco, and bill of interpleader by Boorman and Johnson, who claimed the ownership of the same. Writ of sequestration was granted, and on the trial a verdict was directed for the plaintiff, and final judgment entered for the possession of the tobacco, and for costs. Writ of error by defendants.

The bill of exceptions was in part as follows:

"And it appearing in evidence in the said cause, that on the night of the 18th of February, 1815, Messrs. Livingston, White, and Shepherd brought

from the British fleet the news that a treaty of peace had been signed at Ghent, by the American and British commissioners, contained in a letter from Lord Bathurst to the Lord Mayor of London, published in the British newspapers, and that Mr. White caused the same to be made public, in a handbill, on Sunday morning, 8 o'clock, the 19th of February, 1815, and that the brother of Mr. Shepherd, one of these gentlemen, and who was interested in one-third of the profits of the purchase set forth in said plaintiff's petition, had on Sunday morning, the 19th of February, 1815, communicated said news to the plaintiff; that the said plaintiff, on receiving said news, called on Francis Girault (with whom he had been bargaining for the tobacco mentioned in the petition, the evening previous), said Francis Girault being one of the said house of trade of Peter Laidlaw & Co., soon after sunrise on the morning of Sunday, the 19th of February, 1815, before he had heard said news. Said Girault asked if there was any news which was calculated to enhance the price or value of the article about to be purchased; and that the said purchase was then and there made, and the bill of parcels annexed to the plaintiff's petition, delivered to the plaintiff, between 8 and 9 o'clock in the morning of that day; and that, in consequence of said news, the value of said article had arisen from 30 to 50 per cent. There being no evidence that the plaintiff had asserted or suggested anything to the said Girault, calculated to impose upon him with respect to said news, and to induce him to think or believe that it did not exist; and it appearing that the said Girault, when applied to, on the next day, Monday, the 20th of February, 1815, on behalf of the plaintiff, for an invoice of said tobacco, did not then object to the said sale, but promised to deliver the invoice to the said plaintiff, in the course of the forenoon of that day; the court charged the jury to find for the plaintiff. Wherefore, that justice, by due course of law, may be done in this case, the counsel of said defendants, for them, and on their behalf, prays the court that this bill of exceptions be filed, allowed, and certified as the law directs.

"(Signed) DOMINICK A. HALL, District Judge.

"NEW ORLEANS, this 3d day of May, 1815."

MARSHALL, C. J. The question in this case is, whether the intelligence of extrinsic circumstances, which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor? The court is of opinion, that he was not bound to communicate it. It would be difficult to circumscribe the contrary doctrine within proper limits, where the means of intelligence are equally accessible to both parties. But at the same time, each party must take care not to say or do anything tending to impose upon the other.

The court thinks that the absolute instruction of the judge was erroneous, and that the question, whether any imposition was practiced by the vendee upon the vendor, ought to have been submitted to the jury. For these reasons, the judgment must be reversed, and the cause remanded to the District Court of Louisiana, with directions to award a *venire facias de novo*.

Judgment reversed, and *venire de novo* awarded.[1]

9 Cyc. 412 (75); 415 (82); 416 (85); 20 Cyc. 15–16 (41–44); W. P. 683 (55); 20 H. L. R. 413.

[1] "That case (Laidlaw v. Organ) seems to us to go as far as moral princi-

THE CLANDEBOYE.[1]

70 FEDERAL REP. (C. C. A.), 631.—1895.

This was a libel by Leo Lomm, master of the steamtug Dauntless, against the steamship Clandeboye, W. H. Strickland, master, claimant, to recover compensation for salvage service. The Circuit Court rendered a decree awarding salvage in the sum of $10,000, from which the claimant has appealed.

SEYMOUR, District Judge. The material facts of the case are as follows: The Clandeboye, a large and valuable British steamer, had be-

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ples will justify, even in cases of that description, depending on public intelligence, and further than the same court seemed willing to go in the case of Etting v. Bank of United States, 11 Wheat. 59."—Mellin, C. J., in Lapish v. Wells, 6 Me. 175, 189. It should be noticed that Etting v. Bank of United States was a case of fraud on a surety. See also the criticism in Paddock v. Strobridge, 29 Vt. 470, and the explanation in Stewart v. Wyoming Ranche Co., 128 U. S. 383.

In Croyle v. Moses, 90 Pa. St. 250, an action of deceit, the court says: "The question presented by the points was substantially, if at the time of the sale the horse was known to the defendant to be 'a cribber or wind-sucker,' and this fact was artfully concealed by him to the injury of the plaintiff, whether it was such a concealment of a latent defect as would avoid the contract. The points submitted did not rest on the mere facts that the horse was hitched short and the reasons assigned therefor, but also on the additional facts that the defendant knew him to be a crib-biter, and resorted to this artifice to conceal it, and gave an untruthful reason to mislead and deceive the plaintiff. The complaint is not for a refusal or omission to answer, but for an evasive and artful answer. . . . If the jury should believe, as the plaintiff testified, that he said to the defendant, 'If there is anything wrong with the horse, I do not want him at any price,' and that the defendant, with knowledge he was a crib-biter, answered the plaintiff artfully and evasively, with intent to deceive him, and did thereby deceive him to his injury, it was such a fraud on the plaintiff as would justify him in rescinding the contract." Cf. Dean v. Morey, 33 Ia. 120.

In Stewart v. Wyoming Ranche Co., 128 U. S. 383, the court says: "In an action of deceit, it is true that silence as to a material fact is not necessarily, as matter of law, equivalent to a false representation. But mere silence is quite different from concealment; *aliud est tacere, aliud celare;* a suppression of the truth may amount to a suggestion of falsehood; and if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is in effect a representation that what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff."

[1] Although this case arises in admiralty, the principles upon which it is decided are drawn from the common law and equity.—EDS.

come disabled by breakage of machinery, and had arrived off the Little Bahama Islands. Her mate had been sent by a ship's boat for assistance, and had on the 15th of May, 1894, arrived at Savannah. In pursuance of telegraphic instructions cabled to him by the owners, he had engaged the services of the Morse of New York, then, however, lying at the port of Philadelphia, which had agreed to proceed forthwith to the Little Bahamas, and tow the Clandeboye to Vera Cruz, her port of destination, for the sum of $5,000. Leo Lomm, the libellant, part owner and master of the tug Dauntless, lying at the time at its home port of Brunswick, Ga., having learned from the Savannah papers of the arrival at that port of the mate of the Clandeboye, and of the condition and location of that vessel, on the 17th of May telegraphed, through his agents, to Savannah, and received a reply stating that the tug Morse of New York had been chartered to go to the assistance of the Clandeboye. The distance from New York—and that from Philadelphia is about the same—to Stranger's Cay, where the Clandeboye was lying, is more than 1000 miles. From Brunswick the distance is about one-third as great. Captain Lomm's boat was lying idle. He concluded that he could beat the Morse in a race to the Clandeboye, and that, the master of the latter not knowing of the employment of the Morse, he could obtain a profitable job of salvage. The telegram announcing the employment of the Morse by the Clandeboye's owners reached Brunswick at a little after 3 P.M. of the 17th. Shortly after dark of the same day the Dauntless started for the Bahamas. She arrived at Stranger's Cay before noon on the 19th. Her master had the interview, and made with the master of the Clandeboye the contract, which is a matter in litigation, immediately thereafter, and in a couple of hours the vessels left for Newport News, one in tow of the other. Between three and four days afterwards the Morse reached the the spot where the Clandeboye had been lying at anchor, to find that she had gone. The conversation between the masters of the steamer and of the tug at Stranger's Cay contains the contract entered into between them and the words that led up to it. . . . The material facts in the testimony are that Captain Lomm told Captain Strickland of the arrival of his mate in Savannah, but did not tell him of the employment of the Morse for his relief.

The result of the enterprise of Captain Lomm will be disastrous to the owners of the Clandeboye if the decree of the District Court is allowed to stand. Captain Lomm declined to take the Clandeboye to Vera Cruz, the port to which her cargo was consigned, and did tow her to Newport News, where she was repaired. Fifteen hundred tons of her cargo had to be unloaded and then reloaded before she proceeded to Vera Cruz. Her owners were compelled to pay to the owners of the Morse the sum of $1900 for the services of that tug, and salvage compensation amounting to $10,000—double what the Morse had agreed to

charge for towing the Clandeboye to Vera Cruz—has been awarded to the Dauntless. But the master of the steamship, in charge of his vessel, and not in communication with his owners, was fully empowered to contract with the owners of the Dauntless. The contract made was binding, unless invalidated by the conduct of Captain Lomm in concealing the fact that the owners of the Clandeboye had engaged the services of the Morse. As is said by the judge in the court below:

"Whether or not the right of Captain Lomm to a salvage reward was forfeited by his silence on the subject of the employment of the Morse, in his conferences at the Little Bahama banks with Captain Strickland, is the question on which the case depends. There is no doubt that Captain Lomm ought to have given this information to Captain Strickland. The question is, whether his obligation to do so was so stringent as to constitute the omission a fraudulent piece of deception."

While the right to salvage does not necessarily always arise out of an actual contract, it does so in the case at bar. Services spontaneously rendered to vessels wrecked, or, under the conditions of an earlier period, set upon by pirates, or attacked by enemies, or captured and rescued, are recompensed with salvage money, whether the services were or were not requested. The present case, however, is one of a different character. The Clandeboye, at anchor off the Bahamas, though disabled, and in a position of contingent peril, was not wrecked. She had remained eleven days without injury where she then was, and was under the plenary control of her master, who was at full liberty to accept or refuse the services of the Dauntless.

The arrangement entered into between the two masters constituted a contract, and is subject to the principles which regulate the validity of contracts. If valid, the courts of admiralty are bound to enforce it; if not, to set it aside, in accordance with the general rules affecting all contracts. The law of contracts requires of the parties to them mutual good faith. Is there any principle of mercantile law by which that obligation to good faith which required Captain Lomm to inform Captain Strickland of the hiring of the Morse is relaxed, and is not of so stringent a force as to make the omission fraudulent? If there is, it must be sought in the analogies of the rule of *caveat emptor*. The doctrine of *caveat emptor* belongs, strictly speaking, to the law of sales, but its principles apply to other contracts. Nor is it a doctrine peculiar to the common law. It is in force in all mercantile communities, and has always been administered under the civil law. Pothier says, speaking of the contract of sale: "Good faith prohibits, not only falsehood, but all suppression of everything which he with whom we contract has an interest in knowing, touching the thing which makes the object of the contract;" but he adds, speaking of contracts where one party has not revealed all his information to the other: "The interest of commerce" does not permit "parties to be readily admitted to

demand a dissolution of bargains which have been concluded; they must impute it to themselves in not being better informed." Poth. Cont. Sale, pt. 2, c. 2, §§ 234, 239. In the case of Laidlaw v. Organ, Chief Justice Marshall says: "The question in this case is whether the intelligence of extrinsic circumstances which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor. The court is of the opinion that he was not bound to communicate it. It would be difficult to circumscribe the contrary doctrine within proper limits, where the means of intelligence are equally accessible to both parties." Laidlaw v. Organ, 2 Wheat. 178. "Under the general doctrine of *caveat emptor,* the vendor is not ordinarily bound to disclose every defect of which he may be cognizant, although his silence may operate virtually to deceive the vendee." Story, Cont. § 516. The general rule, both of law and equity, in respect to concealments, is that mere silence with regard to a material fact which there is no obligation to divulge will not avoid a contract. Thus if A, knowing that there is a mine in the land of B, of which B is ignorant, should contract to purchase the land without divulging the fact, it would be a valid contract, although the land were sold at a price which it would be worth without the mine, because A is under no legal obligation, by the nature of the contract, to give any information thereof. Fox v. Macreth, 2 Brown, Ch. 400, 1 White & T. Lead. Cas. Eq. *172. "Without some such general rule the facilities of sale would be greatly impeded, and there would be no security to the vendor" or to the vendee. Story, Cont. § 517.

It will be noticed that the general rule of law is a requirement of good faith in mutual dealings, and that the doctrine of *caveat emptor* is an exception to such requirement, founded upon special reasons, viz. the necessities of commerce, and the impossibility of so limiting any other doctrine as to do justice. As Chief Justice Marshall says, "it would be difficult to circumscribe the contrary doctrine within proper limits." The necessities of commerce require that enterprise should be encouraged by allowing diligence at least its due reward, and not interfering with any proper and reasonably fair competition for intelligence. Any other course would set the active and the slothful upon an equality. *"Vigilantibus non dormientibus jura subveniunt."*

Even more weighty is the second reason given in support of the doctrine. The law works with blunt tools. Fallible memories, prejudiced statements, intentional falsehood, the bias of self-interest, ignorance, and stupidity, are all concomitants of much of the testimony from which she has to make up her judgments. General rules, applicable to the majority of cases, but sometimes having an oppressive bearing upon particular ones, make up the principles upon which,

of necessity, she founds her decisions, for the law must be workable. It must be comprehensible to men who live under its rule, and must not be so complex as to over-burden the memory with minutiæ. Further, were it open, in all cases of contracts, for a dissatisfied party to cry off, by saying that the other party had known better than he the value of the subject-matter, or the market price, or some other extrinsic circumstance, there would be no finality in human dealings, and the only limitation to the litigation that would ensue would be that imposed by the diminution of business caused by such want of finality and certainty.

But *caveat emptor* is but the exception, and not the rule. Its operation is to be diligently circumscribed within proper limits. The doctrine is not applied (1) to cases of active fraud, one variety of which consists in misrepresentation of facts, including what is often equivalent, partial statements; it is not applied (2) to cases in which trust is implied by reason either of the relations to one another of the parties, or the nature of the contract; nor (3) to cases in which, in the absence of laches in the party injured, the persons dealing with one another do not deal upon mutually equal terms, by reason of there being special knowledge in the possession of one party which is inaccessible to the other.

(1) The case of actual or implied misrepresentation needs no illustration.

(2) That of trust includes all the known fiduciary relations,—such as those of attorney and client, guardian and ward, agent and principal, and generally of all who stand in the relation of trustee and *cestui que trust*. It also includes dealings with regard to all matters which from their nature demand mutual confidence. One seeking insurance is bound to state all facts within his knowledge which would have an influence on the terms of the contract, but are unknown to the insurer. A vendor of goods is bound to point out any latent defect in them known to himself. A person selling negotiable paper warrants that he has no knowledge of any facts which prove it worthless. It is held that if one sells to another a check of a third party, knowing that other checks of the same party have been recently dishonored, without communicating the fact to the buyer, it is a fraudulent concealment. Brown v. Montgomery, 20 N. Y. 287.

(3) The case of information possessed by one party and absolutely unobtainable by the other, though of rarer occurrence, is one in which the enforcement of the rule of good faith is fully as imperative as it is in the two classes of cases first mentioned. It is perhaps not properly an exception to the doctrine of *caveat emptor* but rather a case outside of its terms. The purchaser cannot look out for what he cannot have knowledge of. It is thus stated by Chancellor Kent in his Commentaries: "If there be an intentional concealment or suppres-

sion of material facts in the making of a contract in cases in which both parties have not equal access to the means of information, it will be deemed unfair dealing, and will vitiate and avoid the contract." 2 Kent, Comm. Lect. 39, *482. It is implied in Judge Marshall's opinion in Laidlaw v. Organ, already cited, in the sentence ending with the words, "where the means of intelligence are equally accessible to both parties." *Supra.* Under this exception, more logically than under that of special confidence, where it is generally placed in the text books, comes the obligation of one who has manufactured goods to reveal to a purchaser any latent defect in them known to himself, and the similar obligation of a vendor of real estate to inform a vendee of all incumbrances placed by himself upon the land. Where one party to a contract has information inaccessible to the other, neither of the reasons assigned for the principle of *caveat emptor* applies. The contract is not one which should be sustained to encourage mercantile competition and diligence; for, where knowledge cannot be obtained, competition is impossible and diligence useless, there can be no vigilance to be rewarded or sloth to be discouraged. Nor would much danger of unsettling the finality of business transactions or of opening bargains to the uncertainties of conflicting testimony about the equality of knowledge of the parties be likely to arise by reason of the invalidating of contracts for this cause.

The case at bar is the first of the kind that has come before a court of admiralty, but it is as striking a one as could be imagined or invented. It is one in which one party to the bargain has knowledge of a fact which, if known to the other, would have prevented the making of the contract. The ignorance of the fact on the part of the second party is one which cannot be made a subject of controversy, and this ignorance was known to the party suing upon the contract. To give him the benefit of it, to the injury of the claimants, would be, in our opinion, a startling violation of the fundamental principle of all law, that equity is equality. We think that the agreement between the masters of the two vessels, made in the case at bar, is infected with all three of the vices just stated, and is, therefore, not within the doctrine of *caveat emptor.* It must, therefore, be declared void under the principle that requires good faith in mutual dealings.

1. Without placing as much stress upon the point as upon the other two, we yet think it may be fairly held that in telling a part, but not the whole, of the truth to Captain Strickland, Captain Lomm was guilty of that *suppressio veri* which the law calls fraud. By this concealment he induced the former to make a contract which was contrary to the wishes and intent of his owners, who had already made with another a more favorable bargain,—a contract that he would not have made had the facts been fully disclosed.

2. The relation of salvor and saved, while not one of the fiduciary

relations generally referred to in the law books, and accurately defined, as well as classified, is yet a fiduciary one. This will be readily apparent when we remember that in a large number of cases of salvage, particularly the earlier ones, the salvor has actually been in possession of the property saved, holding it for the lien which maritime law gives, and liable as trustee to the owner after the receipt of salvage. Besides this reason, another is to be found in the special confidence resulting from the very nature of the services rendered. We think special confidence as much belongs to the relation between salvor and saved as to that between insurer and insured.

3. Were the other reasons of declaring the contract void absent, we should unhesitatingly do so on the third ground, viz. because the parties were not dealing on terms of equality. There was on the part of Captain Lomm an intentional suppression of a material fact, in relation to which he was informed, while Captain Strickland had not access to any means of obtaining information of it. Looking at the position of the two parties to the bargain from another point of view, there appears to have been a striking inequality between them. The master of the Clandeboye had, when the Dauntless arrived at Stranger's Cay, been for nearly four weeks in a disabled vessel. He had lain helpless at his anchorage for eleven days. His only assistant, who was a navigator (the mate of the vessel), was absent, and he was alone in authority over the Clandeboye. He was suffering from the pressure of anxiety, responsibility, and delay. The master of the Dauntless, aware of all the circumstances, intent solely upon gain, fresh from home, with a mind disengaged and at ease, had an unfair advantage over him. In the short period during which he considered and agreed to accept the services proffered to him, Captain Strickland can hardly be supposed to have had the time or grasp of the facts that would have enabled him to have drawn all the inferences from the fact of his mate's opportunities in Savannah that have been imagined by counsel. During that hurried interview between the masters of the two vessels, it doubtless confusedly occurred to the master of the Clandeboye that his mate was trying to do something for him, and that tugs would be at hand in a short time, prepared to tow him somewhere. Probably he thought of the nearest ports. His conversation shows that thoughts of this kind were in his mind. He was anxious to get away, and with the words "first come, first served," he made terms with Captain Lomm, whose tug had arrived first. But it would be unjust to suppose that he expected or had in his mind any thought of the possible existence of what was actually the fact, viz. a contract under which a powerful tug had been employed by his owners to tow him to the place to which he desired to be taken (Vera Cruz), and was already on the way to Stranger's Cay, near the Little Bahamas, where he was lying. We see no reason to

doubt his statement that, if he had known of the employment of the Morse, he would not have employed the Dauntless. The parties were not dealing on equal terms, and their contract cannot be enforced.

While, however, the contract must be set aside, it does not necessarily follow that the libellant is entitled to no compensation. The question remains, of what, if anything, the Dauntless is entitled to for any net benefit actually received by the Clandeboye from her services. It would be inequitable to allow the latter to refuse to pay for anything of use actually received by her. Nor do we wish to extend to a new case the exaction of penalties in civil actions. In the actual condition and position of the Clandeboye when taken in tow by the Dauntless she needed two things,—repairs, and the opportunity of taking her cargo to Vera Cruz. If Captain Lomm had not interfered, she would have been towed to Vera Cruz by the Morse at an expense, including cost of taking her mate and three seamen from Tybee, of $5200. Upon arriving at Vera Cruz, she could have discharged herself of her cargo, but could not have been repaired, owing to the fact that there are no facilities there for docking vessels. It would therefore have been necessary to have taken her to some port possessed of such facilities. New Orleans, Pensacola, and Newport News have been suggested. The former places are nearer Vera Cruz than Newport News, but the latter is understood to have very superior facilities of the kind needed. The Dauntless rendered a real service to the Clandeboye in towing her to Newport News, where she could be docked. After being repaired, it became possible for her to proceed to Vera Cruz under her own steam, but it seems probable from the testimony that, had she been towed to Vera Cruz in the first instance, she would have been compelled to take a tug in her journey to a dry dock. This expense she has been saved. In addition to this, she was saved by the Dauntless from the perils of a four days' longer stay at her anchorage. On the other hand, at Newport News she was put to the expense of unloading and reloading 1500 tons of her cargo, which is stated by Captain Strickland to have been $1200. The captain also states that the time occupied was sixteen days, and estimates demurrage at £45 per day. From this demurrage there ought to be deducted the four days' time saved her by the Dauntless in taking her from Stranger's Cay before the arrival of the Morse. I suppose, too, that the demurrage is estimated at charter-party rates, and is excessive. I should be disposed to allow $1700 for it. The amount lost to the owners of the Clandeboye by their obligations to the owners of the Morse was $1900. The total on this side, as I estimate it, would be $4800, besides costs of steaming from Newport News to Vera Cruz. Against this is the saving of the $5200, which was to have been paid for the services of the Morse, the cost of taking the Clandeboye from Vera Cruz to a port with docking facilities, which

would have been necessary had she been towed to Vera Cruz before being repaired, and the benefit to her of her earlier rescue from the perils of her position on the coast of the Little Bahamas. On the whole, the court allows $1000 as the net gain to the owners of the Clandeboye for the services of the Dauntless.

Decree modified, and rendered in favor of the libellant in the sum of $1000.

GOFF, Circuit Judge. I agree with the court that the agreement made by the masters of the Clandeboye and the Dauntless must, under the circumstances shown to have existed at the time it was entered into, be declared void, and that it cannot be enforced in a court of admiralty. I do not concur in that part of the opinion that allows the libellant compensation for the services rendered by the Dauntless, undertaken, as they were, in bad faith, with a fraudulent purpose, and the intention of suppressing the truth, thereby taking advantage of a vessel, if not in danger, at least in distress, and causing its owners an additional and unnecessary expense. In a case of this character a court of admiralty is a court of equity, and a party who asks its aid must come before it with clean hands, and with such facts as will, *ex æquo et bono,* show a case proper for its interposition. If the salvors have been guilty of misconduct or of negligence, or have been in collusion with the master, or have attempted to take advantage of the unfortunate, they have thereby forfeited all claim for compensation even for services actually rendered. The Boston, 1 Sumn. 328, Fed. Cas. No. 1673; The Byron, 5 Adm. Rec. 248; Fed. Cas. No. 2275; The Lady Worsley, 2 Spinks, 253; The Bello Corrunes, 6 Wheat. 152; Marvin, Wreck & Salv. § 222; Jones, Salv. 124; Cohen, Adm. Law, 171.

The undisputed facts of this case show it to be at least most peculiar, the books containing nothing similar to it, and in my judgment the courts should not aid in duplicating it by tolerating such litigation. I think that the decree of the District Court should be reversed, and the cause remanded, with directions that the libel be dismissed, and that the claimant recover all costs.[1]

9 Cyc. 415 (82).

[1] *Materiality of representation.*—In Gordon v. Street [1899] 2 Q. B. (C. A.) 641, the plaintiff, a money-lender, advertised under a fictitious name, and the defendant borrowed money and gave a promissory note to secure the sum borrowed and interest. In an action on the promissory note the jury found that the plaintiff intentionally concealed his identity to induce the defendant to borrow money of him as if from another, and that the defendant was so induced; that the plaintiff did so fraudulently; that the defendant entered into the contract believing that he was doing so with a person of the fictitious name given by the plaintiff; and that the defendant repudiated the contract within a reasonable time after he discovered that the plaintiff was the person with whom he had contracted. It was argued for the plaintiff

GRIGSBY *v.* STAPLETON.

94 MISSOURI, 423.—1887.

BLACK, J. This was a suit in two counts. The first declares for the contract price of one hundred head of cattle sold by the plaintiff to the defendant. The second seeks to recover the value of the same cattle. The contract price, as well as the value, is alleged to have been $3431.25. The answer is (1) a general denial; (2) a fraudulent representation as to the health and condition of the cattle; (3) fraudulent concealment of the fact that they had Spanish or Texas fever; (4) tender of their value in their diseased condition.

Plaintiff purchased one hundred and five head of cattle at the stock yards in Kansas City on Friday, July 25, 1884, at $3.60 per hundredweight. He shipped them to Barnard on Saturday. Mr. Ray, plaintiff's agent, attended to the shipment and accompanied the cattle. Ray says it was reported in the yards, before he left Kansas City, that the cattle were sick with Texas fever; some persons said they were sick and some said they were not. When the cattle arrived at

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that these findings were immaterial, because the fraud proved was not material to the contract sued on; for, whether the defendant contracted with plaintiff or with any other lender of money to take a loan of £100 and pay £50 for it, it was the same thing to the defendant, for, when the day of payment arrived, the defendant by law would have to pay the money contracted to be paid to whomsoever he had contracted to pay it, and it mattered not to him who that person was. The court held, "the first point which arises is not whether the fraud was material to the contract entered into, but whether the fraud was material to the inducement which brought about the contract; and, if so, the jury having found the fact of fraud, I cannot doubt that the fraudulent concealing of the plaintiff's name was that which induced the defendant to enter into the contract upon which he is now sued, and was therefore material to the inducement. On what ground is it to be said that a defendant who has been induced by fraud into signing a contract cannot, when sued upon it, set up the well-known defense that he was induced by the fraud of the plaintiff to enter into it? If the fraud be material to the inducement, it appears to me plain that he can. And, further, I will say that to enter into a contract for a loan with a creditor such as Isaac Gordon (I will give his own description of himself in a moment) so that, when the day for payment arrives, the borrower can have no possible chance of a day's or even an hour's grace but on the contrary has the certainty of being pestered with writs and threats of writs and bailiffs and bankruptcy notices (see plaintiff's letter of December 19, 1898, under the name of Addison, about which hereafter), whereby life is rendered unbearable, and health is often injured, is by no means, in my opinion, the same thing as entering into a contract for a loan with a man who, when the day of payment arrives, does none of these things, but, on the contrary, deals in a fair and non-oppressive manner; and to contract with the oppressive class is very much to the detriment of the borrower. I am by no means prepared to say that the fraud in this case was not material to the contract itself."

Barnard, Ray told the plaintiff of the report, and that the cattle were in a bad condition; that one died in the yards at Kansas City before loading, and another died in the cars on the way. On Sunday morning the plaintiff started with them to his home. After driving them a mile or so, he says he concluded to and did drive them back to the yards, because they were wild. One of them died on this drive, and two more died in the pen at Barnard before the sale to defendant. There is much evidence tending to show that plaintiff drove the cattle back because he was afraid to take them to his neighborhood, and that he knew they were diseased, and dying from the fever. He made no disclosure of the fact that the cattle were sick to defendant, nor that they were reported to have the fever. Defendant bargained for the cattle on Sunday afternoon and on Monday morning completed the contract at $3.75 per hundred-weight, and at once shipped them to Chicago. Thirty died on the way, and twenty were condemned by the health officer. It is shown beyond all question that they all had the Texas fever.

The court, by the first instruction given at the request of the plaintiff, told the jury, that if

"Plaintiff made no representations to defendant as to the health or condition of said cattle to influence defendant to believe said cattle were sound or in healthy condition, but, on the contrary, defendant bought said cattle on actual view of the same and relying on his own judgment as to their health and condition, then the jury will find for plaintiff. And if the cattle were bought by the defendant in the manner above stated, it makes no difference whether said cattle, or any of them, were at the time of said sale affected with Texas fever or other disease, or whether plaintiff did or did not know of their being so diseased, as, under such circumstances, he would buy at his own risk and peril."

Caveat emptor is the general rule of the common law. If defects in the property sold are patent and might be discovered by the exercise of ordinary attention, and the buyer has an opportunity to inspect the property, the law does not require the vendor to point out defects. But there are cases where it becomes the duty of the seller to point out and disclose latent defects. Parsons says the rule seems to be, that a concealment or misrepresentation as to extrinsic facts, which affect the market value of the thing sold, is not fraudulent, while the same concealment of defects in the articles themselves would be fraudulent. 2 Pars. on Cont. (6th ed.) 775. When an article is sold for a particular purpose, the suppression of a fact by the vendor, which fact makes the article unfit for the purpose for which it was sold, is a deceit; and, as a general rule, a material latent defect must be disclosed when the article is offered for sale, or the sale will be avoided. 1 Whart. on Cont. sec. 248. The sale of animals which the seller knows, but the purchaser does not, have a contagious disease,

should be regarded as a fraud when the fact of the disease is not disclosed. Cooley on Torts, 481. Kerr says: "Defects, however, which are latent, or circumstances materially affecting the subject-matter of a sale, of which the purchaser has no means, or at least has no equal means of knowledge, must, if known to the seller, be disclosed." Kerr on Fraud and Mis. (Bump's ed.) 101.

In Cardwell v. McClelland (3 Sneed, 150) the action was for fraud in the sale of an unsound horse. The court had instructed that if the buyer relies upon his own judgment and observations, and the seller makes no representations that are untrue, or says nothing, the buyer takes the property at his own risk. This instruction was held to be erroneous, the court saying: "If the seller knows of a latent defect in the property that could not be discovered by a man of ordinary observation, he is bound to disclose it." In Jeffrey v. Bigelow (13 Wend. 518) the defendants, through their agent, sold a flock of sheep to the plaintiff; soon after the sale, a disease known as the *scab* made its appearance among the sheep. It was in substance said, had the defendants made the sale in person, and known the sheep were diseased, it would have been their duty to have informed the purchaser; and the defendants were held liable for the deceit.

In the case of McAdams v. Cates (24 Mo. 223) the plaintiff made an exchange or swap for a filly, unsound from loss of her teeth. The court, after a careful review of the authorities, as they then stood, announced this conclusion: "If the defect complained of in the present case was unknown to the plaintiff, and of such a character that he would not have made the exchange had he known of it, and was a latent defect such as would have ordinarily escaped the observation of men engaged in buying horses, and the defendant, knowing this, allowed the plaintiff to exchange without communicating the defect, he was guilty of a fraudulent concealment and must answer for it accordingly." This case was followed and the principle reasserted in Barron v. Alexander, 27 Mo. 530. Hill v. Balls (2 H. & N. 299) seems to teach a different doctrine, but the cases in this court, supported as they are, must be taken as the established law of this State.

There is no claim in this case that the defendant knew these cattle were diseased. It seems to be conceded on all hands that Texas fever is a disease not easily detected, except by those having had experience with it. The cattle were sold to the defendant at a sound price. If, therefore, plaintiff knew they had the Texas fever, or any other disease materially affecting their value upon the market, and did not disclose the same to the defendant, he was guilty of a fraudulent concealment of a latent defect. It is not necessary to this defense that there should be any warranty or representations as to the health or condition of the cattle. Indeed, so far as this case is concerned, if the cattle had been pronounced by some of the cattlemen to have the Texas fever,

and, after knowledge of that report came to plaintiff, some of them to his knowledge died from sickness, then he should have disclosed these facts to the defendant. They were circumstances materially affecting the value of the cattle for the purposes for which they were bought, or for any other purpose, and of which defendant, on all the evidence, had no equal means of knowledge.

To withhold these circumstances was a deceit, in the absence of proof that defendant possessed such information. It follows that the first instruction is radically wrong, and that the second given at the request of the plaintiff is equally vicious.

The judgment is reversed and the cause remanded.[1]

35 Cyc. 69–70 (40–43); 30 L. R. A. (N. S.) 748; Williston, Sales, p. 1056 (34).

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b. The representation must be a representation of fact.

FISH *v.* CLELAND.

33 ILLINOIS, 237.—1864.

BECKWITH, J. The appellees filed a bill in chancery to set aside a sale made by them to the appellant of a life estate in a town lot in Jacksonville, on the ground of fraud. The specific allegations on which relief is sought are: *First.* That the parties owning the remainder, held a meeting at Jacksonville, at which the appellant represented his wife, one of the owners, when it was concluded by them to file a bill in chancery for a partition of the property, and in order to facilitate the same it was deemed expedient to buy the life estate of Mrs. Cleland on joint account, at the price of $2600 to $2800, or thereabouts; that for this purpose the appellant, representing one of the joint owners, went to Rock Island, where Mrs. Cleland resided, and there purchased her life estate, fraudulently suppressing what had transpired between the joint owners of the remainder at Jacksonville. *Second.* That the appellant on that occasion fraudulently represented to Mrs. Cleland that the property could not be sold unless all the persons interested therein were willing; and that Hatfield, one of the joint owners, was not willing to have it sold, when he well knew that Hatfield wished it partitioned and sold. By means of the suppression of what had transpired between the owners of the remainder, and these representations, the appellees allege that they were

[1] See also Maynard v. Maynard (49 Vt. 297), where it was held a fraud to conceal the impotency of an animal purchased for breeding purposes; Brown v. Montgomery (20 N. Y. 287), where it was held a fraud for the vendors to conceal the insolvency of the makers of a check sold to the vendee. For a case showing a strict application of the maxim *caveat emptor*, see Beninger v. Corwin, 24 N. J. L. 257.

induced to sell the life estate in question for a grossly inadequate consideration.

In the present case it is not material to define the nature and extent of the appellant's obligation to the owners of the remainder. He may have been under obligation to act for them and not for himself, but their rights cannot be asserted by the appellees, and are not involved in the present controversy. It is mentioned in the bill that the appellant was the son-in-law of Mrs. Cleland, but it is not alleged that this relationship occasioned any confidence between the parties. There might have been such a confidence growing out of this relation as to authorize the appellees to act upon the presumption that there could be no concealment of any material fact from them, but a court of equity cannot afford relief on that ground in the absence of any allegation that the parties acted on such presumption, and where there is no evidence from which that fact can be inferred. Undue concealment which amounts to a fraud from which a court of equity will relieve, where there is no peculiar relation of trust or confidence between the parties, is the non-disclosure of those facts and circumstances which one party is under some legal or equitable obligation to communicate to the other, and which the latter has a right, not merely *in foro conscientiæ,* but *juris et de jure,* to know. 1 Story's Eq. § 207. The appellant was not required by this well-established rule to disclose that the joint owners of the remainder contemplated a partition and sale of the property, nor their estimate of the value of the life estate, nor the object of his visit to Rock Island. There is nothing shown in the case creating a legal or equitable obligation on his part to do so. The bill does not allege any misrepresentation of the value of the property or of the life estate therein, and we therefore dismiss from our consideration all the evidence in that regard. The *allegata* must exist before the court can consider the *probata.*

The representation of the appellant that the property could not be sold without all the parties interested therein consented, if understood to mean that a voluntary sale could not be made without such consent, was true, and one which every one must know was true; but if the representation was understood to mean that a sale could not be had by an order of court without the consent of all parties, then it was a representation in regard to the law of the land, of which the one party is presumed to know as much as the other. A representation of what the law will or will not permit to be done, is one upon which the party to whom it is made has no right to rely, and if he does so, it is his own folly, and he cannot ask the law to relieve him from the consequences. The truth or falsehood of such a representation can be tested by ordinary vigilance and attention. It is an opinion in regard to the law, and is always understood as such. 5 Hill, 303. We have not deemed it material to ascertain the truth or false-

hood of the alleged representation that Hatfield was not willing the property should be sold. If untrue, it was only a misrepresentation in regard to the sellers' chance of sale, or the probability of their getting a better price for the property than the price offered by the appellant. Misrepresentations of this nature are not alone sufficient ground for setting aside a contract. 1 Sug. Vend. 7; 12 East, 637. Our duty is to administer the law, and having discharged it, we leave the parties before the tribunal of an enlightened public and to their own consciences. Our duty does not require us to become advocates for or against them before those tribunals. The decree of the court below will be reversed, and the bill dismissed.

Decree reversed.[1]

[Again before the court and reported in 43 Illinois, 282, on the question of relation of trust and confidence.]

9 Cyc. 420 (98, 1); 20 Cyc. 19-20 (59-63); W. P. 688 (1); 745 (39).

ROSS *v.* DRINKARD'S ADM'R.

35 ALABAMA, 434.—1860.

Action by administrator on two bills of exchange drawn by B. on defendant and by him accepted. Defense, that it was represented to defendant and to the drawer of the bill by the payee, that the bills were promissory notes and that defendant was signing as surety for B. Judgment for plaintiff. Defendant appeals.

A. J. WALKER, C. J. . . . We do not deem it necessary to criticise the charges, as to what would constitute a fraud in the execution of the bill. We deem it sufficient for the guidance of the court upon a future trial to say that, if the person who took the bill, procured it by a false statement that it was an ordinary note, when he knew it to be a bill of exchange; and if the parties who gave the bill, did it in ignorance that it was a bill of exchange, and, trusting in the statement made to them, were misled by it, a fraud has been committed, and the defendant would be entitled to relief, to the extent of the injury done by the fraud, as against an indorsee who did not pay value. We think the law upon this point is correctly stated in Townsend & Milliken v. Cowles (31 Ala. 428) in the following words:

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[1] "Trust and confidence reposed in a brother-in-law by his widowed sister-in-law requires the utmost good faith and fair dealing in any contract of sale between them. A misrepresentation of the law by the brother-in-law to his sister-in-law, whereby she is led to believe her title to property held by her is invalid, and on this account she sells it to him, which sale is much to his advantage, vitiates the sale at her election, even though such representation was made in good faith."—Sims v. Ferrill, 45 Ga. 585, 598.

"If the defendant was in fact ignorant of the law, and the other party, knowing him to be so and knowing the law, took advantage of such ignorance to mislead him by a false statement of the law, it would constitute a fraud."

It is conceivable that injury might result from a fraudulent representation that a bill of exchange was an ordinary promissory note; for, under our law, the incident of damages upon protest does not attach to notes, and the makers of such notes are not precluded from making defenses existing between the original parties, when they have passed into the hands of an innocent holder, as is the case with bills of exchange, which are governed by the commercial law.

The judgment of the court below is reversed, and the cause remanded.

9 Cyc. 421 (3); 20 Cyc. 20 (64–65); W. P. 689 (2).

DAWE *v.* MORRIS.

149 MASSACHUSETTS, 188.—1889.

Tort. Defendant demurred. The Superior Court sustained the demurrer, and plaintiff appeals.

DEVENS, J. The alleged misrepresentations of the defendant, by which the plaintiff avers that he was induced to enter into a contract for building thirty miles of the Florida Midland Railway, are that the defendant had purchased a certain quantity of rails at a certain price, and that he would sell those rails to the plaintiff at the same price if he would make such contract. The plaintiff's declaration alleges that the defendant had not then purchased the rails, and did not sell, and did not intend to sell, any rails so purchased to the plaintiff; and that by reason of the contract into which the plaintiff was induced to enter, he was obliged to purchase a large number of rails at a much higher price than that named by the defendant, to his great injury. If the formalities required by law in order that contracts for the sale and delivery of goods of the value here in question had been complied with, that these facts would constitute a contract upon a valuable consideration, will not be questioned. The plaintiff does not seek to recover upon this contract, but in an action of tort in the nature of deceit, because he was induced to enter into the contract with the Florida Railway Company by reason of the representations above set forth.

A representation, in order that, if material and false, it may form the ground of an action where one has been induced to act by reason thereof, should be one of some existing fact. A statement promissory in its character that one will thereafter sell goods at a particular price

or time, will pay money, or do any similar thing, or any assurance as to what shall thereafter be done, or as to any further event, is not properly a representation, but a contract, for the violation of which a remedy is to be sought by action thereon. The statement by the defendant that he would thereafter sell rails at a particular price if the plaintiff would contract with the railway company was a promise, the breach of which has occasioned the injury to the plaintiff. Knowlton v. Keenan, 146 Mass. 86.

The plaintiff contends that, even if this is so, the representation that the defendant had thus purchased the rails at the price named was material and false; but if the allegation that the defendant had purchased the rails be separated from that of the promise to sell them to the plaintiff, it is seen at once to be quite unimportant and immaterial. Had the defendant actually sold, or had he been ready to sell, the rails at the time and price he promised that he would, no action could have been maintained by reason of any false representation that he had purchased them when he made his promise, and no possible injury could thereby have resulted to the plaintiff.

It is urged that, independent of any promise to sell to him, if the plaintiff had believed that the defendant had purchased rails at the price at which he said he had purchased them, the plaintiff might thus have been induced to believe that he himself could thereafter purchase them at the same price. But the injury from a false representation must be direct, and the probability or possibility that, because the defendant had purchased at a particular price, the plaintiff would be able, or might believe himself to be able, to do so also, is too remote to afford any ground for action.

It must be shown, not only that the defendant has committed a tort and that the plaintiff has sustained damage, but that the damage is the clear and necessary consequence of the tort, and such as can be clearly defined and ascertained. Lamb v. Stone, 11 Pick. 527; Bradley v. Fuller, 118 Mass. 239. Quite a different case would be presented if the defendant had falsely represented to the plaintiff, if unskilled in the price of rails, what their market value then was, and what was the price at which they could then be purchased.

It is also said, that if the plaintiff believed that the defendant had actually purchased the rails, at the time of the transaction, and that if he knew that the completion of the railroad was of vital importance to the interests of the defendant, he would more readily have confided in the defendant's promise to sell them, and thus that this representation was material. But in order that a false representation may form the foundation of an action of deceit, it must be as to some subject material to the contract itself. If it merely affect the probability that it will be kept, it is collateral to it. "Representations as to matters which are merely collateral, and do not constitute essential

elements of the contract into which the plaintiff is induced to enter, are not sufficient." Hedden v. Griffin, 136 Mass. 229.

Whether the allegation as to the purchase of the rails by the defendant was material was a question for the court, which was to construe the contract, and determine its legal effect on the duties and liabilities of the parties. It was for it to determine (there being on the declaration of the plaintiff no dispute as to the facts) whether the alleged misrepresentations were material, and such as would invalidate the contract or form the foundation of an action of tort. Penn Ins. Co. v. Crane, 134 Mass. 56.

The plaintiff further contends that, as when goods have been obtained under the form of a purchase with the intent not to pay for them, the seller may, on discovery of this, rescind the contract and repossess himself of the goods as against the purchaser or any one obtaining the goods from him with notice or without consideration, an action of tort should be maintained on an unfulfilled promise which, at the time of making, the promisor intended not to perform, by reason of which non-performance the plaintiff has suffered injury in having been induced to enter into a contract which depended for its successful and profitable performance upon the performance by the defendant of his promise.

Assuming that the plaintiff's declaration enables him to raise this question,—which may be doubted, as the averment that "said defendant had not then purchased said rails, or any part of them, which the defendant then knew, and therefore did not sell, and did not intend to sell, said rails already purchased by them to the plaintiff," is not an averment that the defendant intended not to perform his contract,—there is an obvious difference between the case where a contract is rescinded, and thus ceases to exist, and one in which the injury results from the non-performance of that which it is the duty of the defendant to perform, and where there is no other wrong than such non-performance. To term this a tort would be to confound a cause of action in contract with one in tort, and would violate the policy of the statute of frauds by relieving a party from the necessity of observing those statutory formalities which are necessary to the validity of certain executory contracts.

It was not disputed that the plaintiff's declaration sets forth in the second count a good cause of action. The result is, that as to the first count the entry must be,

Judgment for the defendant affirmed.

9 Cyc. 418–420 (94–97); 20 Cyc. 20 (72); W. P. 650 (1); 689 (3); 693 (7).

SHELDON *v.* DAVIDSON.

85 WISCONSIN, 138.—1893.

Action for deceit. Demurrer to complaint sustained. Plaintiff appeals.

The complaint set up that defendant leased to the plaintiff certain premises on the front of which there was a brick dwelling-house and store, and on the east sixty feet a barn, the lease stipulating that it should not take effect as to the east sixty feet until the expiration (six months later) of an existing lease between defendant and one Veidt; that plaintiff made due inquiry of defendant as to the terms and conditions of Veidt's lease, and that the defendant,

"With intent to deceive and defraud the plaintiff, and for the purpose of inducing him to sign said lease, falsely and fraudulently concealed from the plaintiff the fact that the barn standing upon the said east sixty feet [of said lot] was not the property of said defendant, but was the property of said Veidt, and that the plaintiff could not obtain possession thereof on the 10th day of September next ensuing, and falsely represented to the plaintiff, and for the purpose of inducing the plaintiff to execute said lease, that he could have possession of said sixty feet and the stable standing thereon on and after September 10th next ensuing; that the plaintiff, relying upon the said representations, was thereby induced to sign the aforesaid lease, and did so sign it within a few days thereafter."

The complaint further alleged that the representation was false in that the barn belonged to Veidt and was removed by him at the expiration of his lease. There was no stipulation in the lease regarding the buildings.

ORTON, J. [After stating the above facts.] The *gravamen* of the complaint is the fraudulent *concealment* of the fact that the building on the east sixty feet of the lot was not the property of the defendant, but was the property of Veidt, the lessee; and the false *representation* that the plaintiff could have possession of the said sixty feet, *and the stable standing thereon,* on and after September 10th next ensuing.

1. As to the concealment as a cause of action. That barn on the sixty feet must have been placed there by the tenant, Veidt, temporarily for his own use, with the privilege of removal at the end of his term, and was never a part of the realty. It could not have been so attached to the soil as to become a part of the realty. If it had been, the plaintiff would have been entitled to it by the terms of his lease, and he could have prevented its removal. We conclude, therefore, that the barn was a tenant's *fixture* in fact as well as by the terms of the Veidt lease, and removable by him during his term. The Veidt lease is referred to in the plaintiff's lease. The plaintiff does not state that he did not know all about that lease, and all about the character of that building as having been placed there by the

tenant, and removable. He states only that he inquired of the defendant about the terms and conditions of that lease, and does not state whether the defendant told him what they were or not. He does not state that the defendant knew, or had reason to know, that he, the plaintiff, was ignorant of the fact that the defendant did not own the barn. The defendant might well have supposed that the plaintiff knew the terms of that lease referred to in his own lease, and the character of the barn as a fixture was open to common observation. But more material than even this is the absence of any averment that the plaintiff *was induced* to sign the lease by such fraudulent concealment. It states merely that the concealment was for the purpose of inducing him to do so, but fails to state that he was actually induced to do so by it. It is very clear that there are not sufficient allegations in the complaint to make the fraudulent concealment a cause of action.

2. As to the false representation that the plaintiff "could have possession of said east sixty feet, *and the stable standing thereon,* on and after September 10th next ensuing." The plaintiff did have possession of the sixty feet, so that such part of the representation at least was not false. As to the other part of the representation, it relates to a future event, and is not of an *existing* fact or of a *past* event, and therefore is not actionable if such event should not occur. It is a mere opinion, prediction, or promise of a future condition of things, upon which the plaintiff had no right to rely. In Morrison v. Koch (32 Wis. 254) the representation was that a certain dam "would always in the future continue to furnish the full amount of power conveyed." Mr. Justice Lyon said in the opinion: "It seems quite clear that no charge of fraud can be predicated upon it. At most there was a mere expression of opinion that in the future the conditions on which the water supply depended would remain favorable to a continuance of the supply. . . . It is wanting in all the essential elements which constitute a fraud." In Patterson v. Wright (64 Wis. 289) the representation was that the party "said or promised that he would pay a certain sum of money as a consideration of and to induce the giving of certain notes, and upon which they were obtained." It was held "that the representation must relate to a *present* or *past* state of facts, and that relief as for deceit cannot be obtained for the non-performance of a promise or other statement looking to the future"; citing the above case, Bigelow, Frauds, 11, 12, and Fenwick v. Grimes, 5 Cranch C. C. 439. In Maltby v. Austin (65 Wis. 527) the representation was "of the value of a certain tract of land," and in Prince v. Overholser (75 Wis. 646) it was "that a certain bounty land warrant would locate any kind of government land," and neither was held actionable. The principle has become elementary in respect to all representations relating to the future and as mere expressions

of opinion. This representation is not fraudulent or actionable for both reasons. It relates to a future event, and is a mere opinion, viz., "that the plaintiff *could* have possession of the building on the east sixty feet of the lot on and after September 10th next ensuing." This statement was made before March 16, 1891.

This disposes of all the pretended deceit or fraud alleged in the complaint. The demurrer was properly sustained.

By the court. The order of Superior Court is affirmed, and the cause remanded for further proceedings according to law.[1]

9 Cyc. 418–420 (94–97); 20 Cyc. 20 (72); W. P. 689 (3); 12 H. L. R. 438; 11 C. L. R. 677.

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c. The representation must be made with knowledge of its falsehood or without belief in its truth.

CHATHAM FURNACE CO. *v.* MOFFATT.

147 MASSACHUSETTS, 403.—1888.

Tort for false and fraudulent representations made by the defendant, whereby the plaintiff was induced to take a lease of a mine, and to purchase certain mining machinery. Judgment for plaintiff.

C. ALLEN, J. It is well settled in this commonwealth that the charge of fraudulent intent, in an action for deceit, may be maintained by proof of a statement made, as of the party's own knowledge, which is false, provided the thing stated is not merely a matter of opinion, estimate, or judgment, but is susceptible of actual knowledge; and in such case it is not necessary to make any further proof of an actual intent to deceive. The fraud consists in stating that the party knows

[1] In Adams v. Gillig, 199 N. Y. 314, "defendant purposely, intentionally and falsely stated to the plaintiff that he desired to purchase a portion of her vacant lot, located in a residence district, for the purpose of building a dwelling or dwellings thereon. These representations were false and fraudulent and made with the intent to deceive the plaintiff who relied thereon and executed a conveyance to defendant. Defendant while negotiating intended to build, and immediately after the purchase proceeded to arrange for building, a public automobile garage on the lot, the construction of which will greatly damage plaintiff's remaining property. The plaintiff without delay communicated with the defendant and offered to procure another site for his garage, pay all the expenses he had incurred up to that time and restore the consideration he had paid for the property if he would reconvey the property to her. This the defendant refused to do. *Held*, that since equity will interfere to grant relief where necessary to prevent the consummation of a fraud, the false statements made by the defendant of his intention should, under the circumstances, be deemed to be a statement of a material, existing fact of which the court will lay hold for the purpose of defeating the wrong that would otherwise be consummated thereby." (Syllabus.) Accord, McReady v. Phillipps, 56 Neb. 446; and see 12 H. L. R. 438; 11 C. L. R. 677.

the thing to exist, when he does not know it to exist; and if he does not know it to exist, he must ordinarily be deemed to know that he does not. Forgetfulness of its existence after a former knowledge, or a mere belief of its existence, will not warrant or excuse a statement of actual knowledge. This rule has been steadily adhered to in this commonwealth, and rests alike on sound policy and on sound legal principles. Cole v. Cassidy, 138 Mass. 437; Savage v. Stevens, 126 Mass. 207; Tucker v. White, 125 Mass. 344; Litchfield v. Hutchinson, 117 Mass. 195; Milliken v. Thorndike, 103 Mass. 382; Fisher v. Mellen, 103 Mass. 503; Stone v. Denny, 4 Met. 151; Page v. Bent, 2 Met. 371; Hazard v. Irwin, 18 Pick. 95. And though this doctrine has not always been fully maintained elsewhere, it is supported by the following authorities, amongst others: Cooper v. Schlesinger, 111 U. S. 148; Bower v. Fenn, 90 Penn. St. 359; Brownlie v. Campbell, 5 App. Cas. 925, 953, by Lord Blackburn; Reese River Mining Co. v. Smith, L. R. 4 H. L. 64, 79, 80, by Lord Cairns; Slim v. Croucher, 1 De G., F. & J. 518, by Lord Campbell. See also Peek v. Derry, 59 L. T. (N. S.) 78, which has been published since this decision was announced.

In the present case, the defendant held a lease of land, in which there was iron ore. The mine had formerly been worked, but operations had ceased, and the mine had become filled with water and débris. The defendant sought to sell this lease to the plaintiff, and represented to the plaintiff, as of his own knowledge, that there was a large quantity of iron ore, from 8000 to 10,000 tons, in his ore bed, uncovered and ready to be taken out, and visible when the bed was free from water and débris. The material point was, whether this mass of iron ore, which did in truth exist under the ground, was within the boundaries of the land included in the defendant's lease, and the material part of the defendant's statement was, that this was in his ore bed; and the representations were not in fact true in this, that while in a mine connecting with the defendant's shafts there was ore sufficient in quantity and location relative to drifts to satisfy his representations, if it had been in the land covered by the defendant's lease, that ore was not in the defendant's mine, but was in the adjoining mine; and the defendant's mine was in fact worked out.

During the negotiations, the defendant exhibited to the plaintiff a plan of a survey of the mine, which had been made for him, and the plaintiff took a copy of it. In making this plan, the surveyor, with the defendant's knowledge and assent, did not take the course of the first line leading from the shaft through which the mine was entered, but assumed it to be due north; and the defendant never took any means to verify the course of this line. In point of fact, this line did not run due north, but ran to the west of north. If it had run due north, the survey, which was in other respects correct, would have

correctly shown the mass of iron ore in question to have been within the boundaries of the land covered by the defendant's lease; but in consequence of this erroneous assumption the survey was misleading, the iron ore being in fact outside of those boundaries. It thus appears that the defendant knew that what purported to be a survey was not in all respects an actual survey, and that the line upon which all the others depended had not been verified, but was merely assumed; and this was not disclosed to the plaintiff. The defendant took it upon himself to assert, as of his own knowledge, that this large mass of ore was in his ore bed, that is, within his boundaries; and in support of this assertion he exhibited the plan of the survey, the first line of which had not been verified, and was erroneous. Now this statement was clearly of a thing which was susceptible of knowledge. A real survey, all the lines of which had been properly verified, would have shown with accuracy where the ore was situated. It was within the defendant's knowledge that the first line of the plan had not been verified. If under such circumstances he chose to take it upon himself to say that he knew that the mass of ore which had been discovered was in his ore bed, in reliance upon a plan which he knew was not fully verified, it might properly be found that the charge of fraudulent misrepresentation was sustained, although he believed his statement to be true.

The case of Milliken v. Thorndike (103 Mass. 382) bears a considerable resemblance to the present in its facts. That was an action by a lessor to recover rent of a store, which proved unsafe, certain of the walls having settled or fallen in shortly after the execution of the lease. The lessor exhibited plans, and, in reply to a question if the drains were where they were to be according to the plans, said that the store was built according to the plans in every particular; but this appeared by the verdict of the jury to be erroneous. The court said, by Mr. Justice Colt, that the representation "was of a fact, the existence of which was not open and visible, of which the plaintiff (the lessor) had superior means of knowledge, and the language in which it was made contained no words of qualification or doubt. The evidence fully warranted the verdict of the jury."

In respect to the rule of damages, the defendant does not in argument contend that the general rule adopted by the judge was incorrect, but that it does not sufficiently appear what considerations entered into his estimate. No requests for rulings upon this subject were made, and there was no error in the course pursued by the judge.

Exceptions overruled.[1]

9 Cyc. 422 (10); 424 (15); 20 Cyc. 27 (92); 29 (93); Williston, Sales, p. 1060 (49).

[1] That a defendant is not liable in an action for deceit where the misrepresentation was made innocently, see Cowley v. Smyth, 46 N. J. L. 380; Da Lee

McKOWN *v.* FURGASON.

47 IOWA, 636.—1878.

Action for deceit in the sale of a note. Judgment for plaintiff. Defendant appeals.

DAY, J. The court instructed the jury as follows:

"3. If [you find that] at the time defendant sold the note in question to the plaintiff, he represented said note was good, and that the maker thereof, H. E. Stewart, was solvent; that the plaintiff relied upon said representations in purchasing said note; and that said representations were untrue at the time they were made; and that said defendant knew they were untrue, or had no reasonable grounds for believing them true, your verdict should be for the plaintiff for the amount paid for said note, together with six per cent interest from the date of said payment."

The giving of this instruction is assigned as error. It was not proper to give this instruction under the issues presented. The plaintiff claims of defendant damages for fraudulently making representations, with full knowledge when he made them that they were false. Upon this question the case of Pearson v. Howe (1 Allen, 207) is directly in point. In that case it was held that in an action for deceit a declaration which alleges that the representations made were well known by defendant to be untrue is not supported by proof, simply, that the defendant had reasonable cause to believe that they were untrue.

Judgment reversed.[1]

9 Cyc. 423–424 (13–15); 20 Cyc. 24 (89); 26 (92).

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v. Blackburn, 11 Kans. 150; Tucker v. White, 125 Mass. 344; Wakeman v. Dalley, 51 N. Y. 27. *Contra:* Holcomb v. Noble, 69 Mich. 396; Davis v. Nuzum, 72 Wis. 439, in which States no such distinction is taken. If an independent action of deceit could not be maintained, it would seem that a claim for damages for deceit could not be interposed as a defense to an action for the price. McIntyre v. Buell, 132 N. Y. 192; King v. Eagle Mills, 10 Allen, 548; First N. B. v. Yocum, 11 Neb. 328. *Contra:* Mulvey v. King, 39 Ohio St. 491; Loper v. Robinson, 54 Tex. 510.

[1] "The plaintiff requested the court to charge that if the defendant knew or had reason to believe there was not one hundred and twenty-five acres of land, he was guilty of fraud in representing that there was that quantity. The court declined to adopt that precise language, but repeated what had been previously said, that if defendant, intending to cheat and defraud, misrepresented or concealed a material fact, he was liable for the wrong. The request was erroneous. It sought to substitute for the fraudulent intent a fact which might or might not, in the minds of the jury, establish that intent. The defendant might have had reason to believe that there was less than one hundred and twenty-five acres of land, and yet not have believed it, but have honestly believed the reverse. The cases cited in support of the request to charge, when carefully read, are found to guard against any such misapprehension. (Meyer v. Amidon, 45 N. Y. 169; Wakeman v. Dalley, 51 Id. 27.) They treat the fact that one 'has reason to believe' his statement to be false merely as evidence

d. The representation must be made with the intention that it should be acted upon by the injured party.

STEVENS *v.* LUDLUM.

46 MINNESOTA, 160.—1891.

[Reported herein at p. 315.]

HUNNEWELL *v.* DUXBURY.

154 MASSACHUSETTS, 286.—1891.

BARKER, J. The action is tort for deceit, in inducing the plaintiff to take notes of a corporation by false and fraudulent representations, alleged to have been made to him by the defendants, that the capital stock of the corporation, amounting to $150,000, had been paid in, and that patents for electrical advertising devices, of the value of $149,650, had been transferred to it.

From the exceptions, it appears that the corporation was organized in January, 1885, under the laws of Maine, and engaged in business in Massachusetts; that it filed with the commissioner of corporations a certificate containing the above statements, dated August 11, 1885, as required by the St. of 1884, c. 330, § 3, signed by the defendants, with a jurat stating that on that date they had severally made oath that the certificate was true, to the best of their knowledge and belief; that before the plaintiff took the notes the contents of this certificate had been communicated to him by an attorney whom he had employed to examine the records; and that he relied upon its statements in accepting the notes. There was no other evidence of the making of the alleged representations.

The main question, which is raised both by the demurrer to the second count of the declaration and by the exception, is whether the plaintiff can maintain an action of deceit for alleged mistatements contained in the certificate. In the opinion of a majority of the court this question should have been decided adversely to the plaintiff. The execution by the defendants of the certificate to enable the corporation to file it under the St. of 1884, c. 330, § 3, was too remote from any design to influence the action of the plaintiff to make it the foundation of an action of deceit.

To sustain such an action, misrepresentations must either have

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tending to prove the fraudulent intent, and require that intent to be established. The court applied the needed correction to the request, and declined to make conclusive as matter of law what was properly but evidence upon the question of fact."—Finch, J., in Salisbury v. Howe, 87 N. Y. 128, 135.

been made to the plaintiff individually, or as one of the public, or as one of a class to whom they are in fact addressed, or have been intended to influence his conduct in the particular of which he complains.

This certificate was not communicated by the defendants, or by the corporation, to the public or to the plaintiff. It was filed with a state official for the definite purpose of complying with a requirement imposed as a condition precedent to the right of the corporation to act in Massachusetts. Its design was not to procure credit among merchants, but to secure the right to transact business in the State.

The terms of the statute carry no implication of such a liability. Statutes requiring similar statements from domestic corporations have been in force here since 1829, and whenever it was intended to impose a liability for false statements contained in them there has been an express provision to that effect; and a requisite of the liability has uniformly been that the person to be held signed knowing the statement to be false. St. 1829, c. 53, § 9; Rev. Sts. c. 38, § 28; Gen. Sts. c. 60, § 30; St. 1870, c. 224, § 38, cl. 5; Pub. Sts. c. 106, § 60, cl. 5. To hold that the St. of 1884, c. 330, § 3, imposes upon those officers of a foreign corporation who sign the certificate, which is a condition of its admission, the added liability of an action of deceit, is to read into the statute what it does not contain.

If such an action lies, it might have been brought in many instances upon representations made in returns required of domestic corporations, and yet there is no instance of such an action in our reports. In Fogg v. Pew (10 Gray, 409) it is held that the misrepresentations must have been intended and allowed by those making them to operate on the mind of the party induced, and have been suffered to influence him. In Bradley v. Poole (98 Mass. 169) the representations proved and relied on were made personally by the defendant to the plaintiff, in the course of the negotiation for the shares the price of which the plaintiff sought to recover. Felker v. Standard Yarn Co. (148 Mass. 226) was an action under the Pub. Sts. c. 106, § 60, to enforce a liability explicitly declared by the statute.

Nor do we find any English case which goes to the length necessary to sustain the plaintiff's action. The English cases fall under two heads: 1. Those of officers, members, or agents of corporations, who have issued a prospectus or report addressed to and circulated among shareholders or the public for the purpose of inducing them to take shares. 2. Those of persons who, to obtain the listing of stocks or securities upon the stock exchange in order that they may be more readily sold to the public, have made representations to the officials of the exchange, which in due course have been communicated to buyers. Bagshaw v. Seymour, 32 L. T. 81; Bedford v. Bagshaw, 4 H. & N. 538; Watson v. Earl of Charlemont, 12 Q. B. 856; Clarke v.

Dickson, 6 C. B. (N. S.) 453; Jarrett v. Kennedy, 6 C. B. 319; Campbell v. Fleming, 1 A. & E. 40; Peek v. Derry, 37 Ch. D. 541, and 14 App. Cas. 337; Angus v. Clifford (1891), 2 Ch. 449. In these cases the representations were clearly addressed to the plaintiffs among others of the public or of a class, and were plainly intended and calculated to influence their action in the specific matter in which they claimed to have been injured. So, too, in the American cases relied on to support the action. Morgan v. Skiddy, 62 N. Y. 319; Terwilliger v. Great Western Telegraph Co., 59 Ill. 249; Paddock v. Fletcher, 42 Vt. 389. The numerous cases cited in the note to Pasley v. Freeman, in 2 Smith's Lead. Cas. (9th Am. ed.) 1320, are of the same character.

In the case at bar, the certificate was made and filed for the definite purpose, not of influencing the public, but of obtaining from the State a specific right, which did not affect the validity of its contracts, but merely relieved its agents in Massachusetts of a penalty. It was not addressed to or intended for the public, and was known to the plaintiff only from the search of his attorney. It could not have been intended or designed by the defendants that the plaintiff should ascertain its contents and be induced by them to take the notes. It is not such a representation, made by one to another with intent to deceive, as will sustain the action. Its statements are in no fair sense addressed to the person who searches for, discovers, and acts upon them, and cannot fairly be inferred or found to have been made with the intent to deceive him.

This view of the law disposes of the case, and makes it unnecessary to consider the other questions raised at the trial.

Demurrer and exceptions sustained.

9 Cyc. 424–425 (18–19); 20 Cyc. 35 (38–39); W. P. 703 (23); 704 (25).

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e. The representation must actually deceive.

LEWIS *v.* JEWELL.

151 MASSACHUSETTS, 345.—1890.

Tort, by the administratrix of the estate of Edward Lewis, for false and fraudulent representations made by the defendant to the intestate in a sale of carpets represented to amount to 900 yards, which in fact amounted to only 595 yards. Exceptions by defendant to refusal of court to charge that if intestate had full means of ascertaining the number of yards and had an opportunity to inspect and measure them, the representations of defendant, though false and intentional, would not entitle plaintiff to recover, and to the charge of the court that if defendant made an intentional false representation

to induce the intestate to purchase, and if the intestate, in the exercise of due care, relied on it, the jury would be justified in finding for the plaintiff. Verdict for the plaintiff.

KNOWLTON, J. The carpets bought by the plaintiff's intestate covered four floors, consisting of twelve rooms, besides the hall and stairs, in a dwelling-house. The number of yards of material contained in them was an important element in determining their value, which might be the subject of a fraudulent representation. The representation of the defendant was not a mere estimate, but a statement purporting to be made as of her own knowledge, and there was evidence tending to show that it was known by her to be false. There was also evidence that the purchaser relied upon it; and if the testimony introduced by the plaintiff was true, the defendant was liable for fraud, unless the purchaser was bound to measure the carpets for himself, or to avail himself of his other opportunities of ascertaining the quantity.

Upon the evidence presented, it could not properly have been ruled, as matter of law, that the facts were so obvious or so easily discoverable that the plaintiff's intestate had no right to rely on the defendant's representations. In this commonwealth, and in other American States, in regard to representations by a vendor in a sale of land, it has been held that, in the absence of other fraud, a vendee to whom boundaries are pointed out has no right to rely on the vendor's statements as to quantity, but if he deems the quantity material, he should ascertain it for himself. Gordon v. Parmelee, 2 Allen, 212; Noble v. Googins, 99 Mass. 231, and cases cited; Parker v. Moulton, 114 Mass. 99. We are of opinion that this rule should not be extended so as to include a case like the present, and that the instructions under which the questions were submitted to the jury were correct and sufficient.

Exceptions overruled.[1]

9 Cyc. 428–430 (34–39); 20 Cyc. 39–41 (54–65).

[1] "Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and has been misled by overconfidence in the statements of another. And the same rule obtains when the complaining party does not rely upon the misrepresentations, but seeks from other quarters means of verification of the statements made, and acts upon the information thus obtained."—Mr. Justice Field, in Slaughter's Adm'r v. Gerson, 13 Wall. (U. S.) 379, 383.

For an extreme application of the above rule, see Long v. Warren, 68 N. Y. 426, and see the criticisms on it in Albany City Savings Institution v. Burdick, 87 N. Y. 40, and Schumaker v. Mather, 133 N. Y. 590.

(*ii.*) *Remedies for fraud.*

BROWN, J., IN VAIL *v.* REYNOLDS.

118 NEW YORK, 297.—1890.

A person who has been induced by fraudulent representations to become the purchaser of property, has upon the discovery of the fraud three remedies open to him, either of which he may elect. He may rescind the contract absolutely and sue in an action at law to recover the consideration parted with upon the fraudulent contract. To maintain such action he must first restore, or offer to restore, to the other party whatever may have been received by him by virtue of the contract. (Gould v. Cayuga County Nat. Bank, 86 N. Y. 75; Thayer v. Turner, 8 Met. 550; Evans v. Gale, 17 N. H. 573.) He may bring an action in equity to rescind the contract and in that action have full relief. (Allerton v. Allerton, 50 N. Y. 670.) Such an action is not founded upon a rescission, but is maintained *for* a rescission, and it is sufficient therefore for the plaintiff to offer in his complaint to return what he has received and make tender of it on the trial. Lastly, he may retain what he has received and bring an action at law to recover damages sustained. This action proceeds upon an affirmance of the contract and the measure of the plaintiff's recovery is the difference between the article sold and what it should be according to the representations. Krum v. Beach, (96 N. Y. 398.)

9 Cyc. 432 (47–48); W. P. 706 (26); 8 C. L. R. 123; 1 Mich. L. R. 663.

DANFORTH, J., IN CONROW *v.* LITTLE.

115 NEW YORK, 387.—1889.

The contract between Branscom and the plaintiffs was, upon the discovery of Branscom's fraud, voidable at their election. As to him the plaintiffs could affirm or rescind it. They could not do both, and there must be a time when their election should be considered final. We think that time was when they commenced an action for the sum due under the contract, and in the course of its prosecution applied for and obtained an attachment against the property of Branscom as their debtor. They then knew of the fraud practiced by him, and disclosed that knowledge in the affidavit on which the attachment was granted, and became entitled to that remedy because it was made to appear that a cause of action existed in their favor by reason of a breach of contract to pay for goods and money loaned obtained by fraud. The attachment was levied and the action pending when the present action, which repudiates the contract and has no support except on the theory

of its disaffirmance, was commenced. The two remedies are inconsistent. By one the whole estate of the debtor is pursued in a summary manner and payment of a debt sought to be enforced by execution; by the other specific articles are demanded as the property of the plaintiff. One is to recover damages in respect of the breach of the contract, the other can be maintained only by showing that there was no contract. After choosing between these modes of proceeding the plaintiffs no longer had an option. By bringing the first action, after knowledge of the fraud practiced by Branscom, the plaintiffs waived the right to disaffirm the contract, and the defendants may justly hold them to their election. The principle applied in Foundry Company v. Hersee (103 N. Y. 26) and Hays v. Midas (104 Id. 602) requires this construction, for the present contains the element lacking in those cases, viz.: knowledge of the fraud practiced by the vendee; and by reason of it the plaintiffs were put to their election. It is not at all material to the question that the plaintiff discontinued the first suit before bringing the present to trial, for it is the fact that the plaintiffs elected this remedy, and acted affirmatively upon that election, that determines the present issue. Taking any step to enforce the contract was a conclusive election not to rescind it on account of anything known at the time. After that the option no longer existed, and it is of no consequence whether or not the plaintiffs made their choice effective.[1]

9 Cyc. 437 (76); W. P. 708 (29).

[1] *Restoration of consideration upon rescission.*—In Pearsoll v. Chapin, 44 Pa. St. 9, the court says: "The court instructed the jury that, if the sale was induced by the false and fraudulent representations of the vendor, the plaintiff had a right to recover back the price without first tendering a reconveyance, and this is the first point which we shall discuss. . . . If the court has stated this point correctly, then a defrauded vendee may recover back the price without rescinding the contract, and while retaining the title acquired by it, and perhaps without liability to return it, since the vendor cannot allege his own fraud in order to reclaim it; he may rescind for what he gave and affirm for what he got, and is thus allowed by the law to return injustice for fraud, and invited to learn the art of being duped as a mode of profitable speculation. We do not so understand the law.

If this be indeed the law of such cases, then the fraud is not corrected, but punished by this remedy. And the punishment is grossly unjust because grossly unequal, and it can he only by mere accident that it is at all proportionate to the offence. No matter how small the fraud, it forfeits the whole value contracted for, be it ten or ten thousand dollars. And, if nothing can confirm the contract in favour of the defrauder, then the other party may get all he bargained for, and afterwards recover back all he gave; in order to make the punishment as severe as possible, he may, knowing of the fraud, wait until he obtains full performance from his adversary, and then set up the fraud as a ground for rescinding the contract for all he paid under it. This is making a person who is guilty of a fraud practically an outlaw, for all his interests that are involved in the fraudulent con-

Duress.

MORSE *v.* WOODWORTH.

155 MASSACHUSETTS, 233.—1892.

Action of contract to recover the amount of three promissory notes given by defendant to plaintiff, and delivered up to defendant by plaintiff and mutual releases executed under threats of prosecution and arrest on a criminal charge of embezzling defendant's money.

The court charged the jury in substance that to constitute duress by threats of imprisonment the threats must be such as actually overcame the will of the plaintiff, and that in testing the question the jury might consider whether they were such as would overcome the will of a man of ordinary firmness; and refused to charge, at the request of defendant, that if the defendant believed plaintiff had wrongfully taken money belonging to defendant, and no civil or criminal proceeding had been begun, then mere threats of prosecution or arrest would not constitute duress, that mere threats of criminal prosecution or arrest, when no warrant has been issued or proceedings commenced, do not constitute duress. The court referred to the ambiguity in the word "mere," and reiterated its former charge. Defendant excepted. Verdict for plaintiff.

KNOWLTON, J. . . . The only remaining exceptions relate to the requests of the defendant and the rulings of the court in regard to duress. The plaintiff contended that he gave up the notes and signed the release under duress by threats of imprisonment. The question of law involved is whether one who believes and has reason to believe that another has committed a crime, and who, by threats of prosecution and imprisonment for the crime, overcomes the will of the other,

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tract." This case contains a discussion of the use and meaning of the words "void" and "voidable" as used with respect to contracts.

In Masson v. Bovet, 1 Denio. 69, the court held that in rescission for fraud "the law only requires the injured party to restore what he has received and, as far as he can, undo what had been done in execution of the contract. This is all that the party defrauded can do, and all that honesty and fair dealing require of him." In Moore v. Mutual Reserve Assoc., 121 N. Y. Appellate Div. 335, a policyholder who had been fraudulently induced by the company to take out the policy, was allowed, by rescission, to recover back the premiums paid, without deduction of the value of insurance under the policy to the time of rescission. This upon the ground that he "does not possess and is not seeking to retain anything that would imply an affirmance of the contract, or that would be inequitable for him to keep"; (but Chester J. dissented). Compare State ex rel. Schaefer v. Ins. Co., 104 Minn. 447. See also, upon the question of restoration of consideration in rescission for fraud, 8 C. L. R. 123 (note); Johnson, Rescission of contracts —restoration of consideration, 18 Central Law Jour. 482; 9 Cyc. 437–442 (81–96); W. P. 713 (38).

and induces him to execute a contract which he would not have made voluntarily, can enforce the contract if the other attempts to avoid it on the ground of duress.

Duress at the common law is of two kinds, duress by imprisonment and duress by threats. Some of the definitions of duress *per minas* are not broad enough to include constraint by threats of imprisonment. But it is well settled that threats of unlawful imprisonment may be made the means of duress, as well as threats of grievous bodily harm. The rule as to duress *per minas* has now a broader application than formerly. It is founded on the principle that a contract rests on the free and voluntary action of the minds of the parties meeting in an agreement which is to be binding upon them. If an influence is exerted on one of them of such a kind as to overcome his will and compel a formal assent to an undertaking when he does not really agree to it, and so to make that appear to be his act which is not his but another's, imposed on him through fear which deprives him of self-control, there is no contract unless the other deals with him in good faith, in ignorance of the improper influence, and in the belief that he is acting voluntarily.

To set aside a contract for duress it must be shown, first, that the will of one of the parties was overcome, and that he was thus subjected to the power of another, and that the means used to induce him to act were of such a kind as would overcome the mind and will of an ordinary person. It has often been held that threats of civil suits and of ordinary proceedings against property are not enough, because ordinary persons do not cease to act voluntarily on account of such threats. But threats of imprisonment may be so violent and forceful as to have that effect. It must also be shown that the other party to the contract is not, through ignorance of the duress or for any other reason, in a position which entitles him to take advantage of a contract made under constraint without voluntary assent to it. If he knows that means have been used to overcome the will of him with whom he is dealing, so that he is to obtain a formal agreement which is not a real agreement, it is against equity and good conscience for him to become a party to the contract, and it is unlawful for him to attempt to gain a benefit from such an influence improperly exerted.[1]

A contract obtained by duress of unlawful imprisonment is voidable. And if the imprisonment is under legal process in regular form, it is nevertheless unlawful as against one who procured it improperly for the purpose of obtaining the execution of a contract; and a contract obtained by means of it is voidable for duress. So it has been said that imprisonment under a legal process issued for a just cause is duress that will avoid a contract if such imprisonment is unlawfully

[1] As to duress by a third party, see note 12 C. L. R. 468.

used to obtain the contract. Richardson v. Duncan, 3 N. H. 508. See also Foshay v. Ferguson, 5 Hill (N. Y.), 154; United States v. Huckabee, 16 Wall. 414, 431; Miller v. Miller, 68 Penn. St. 486; Walbridge v. Arnold, 21 Conn. 424; Wood v. Graves, 144 Mass. 365, and cases cited.

It has sometimes been held that threats of imprisonment, to constitute duress, must be of unlawful imprisonment. But the question is, whether the threat is of imprisonment which will be unlawful in reference to the conduct of the threatener who is seeking to obtain a contract by his threat. Imprisonment that is suffered through the execution of a threat which was made for the purpose of forcing a guilty person to enter into a contract may be lawful as against the authorities and the public, but unlawful as against the threatener, when considered in reference to his effort to use for his private benefit processes provided for the protection of the public and the punishment of crime. One who has overcome the mind and will of another for his own advantage, under such circumstances, is guilty of a perversion and abuse of laws which were made for another purpose, and he is in no position to claim the advantage of a formal contract obtained in that way, on the ground that the rights of the parties are to be determined by their language and their overt acts, without reference to the influences which moved them. In such a case, there is no reason why one should be bound by a contract obtained by force, which in reality is not his, but another's.

We are aware that there are cases which tend to support the contention of the defendant. Harmon v. Harmon, 61 Maine, 227; Bodine v. Morgan, 10 Stew. 426, 428; Landa v. Obert, 45 Texas, 539; Knapp v. Hyde, 60 Barb. 80. But we are of opinion that the view of the subject heretofore taken by this court, which we have followed in this opinion, rests on sound principles, and is in conformity with most of the recent decisions in such cases, both in England and America. Hackett v. King, 6 Allen, 58; Taylor v. Jaques, 106 Mass. 291; Harris v. Carmody, 131 Mass. 51; Bryant v. Peck & Whipple Co., 154 Mass. 460; Williams v. Bayley, L. R. 1 H. L. 200; S. C., 4 Giff. 638, 663, note; Eadie v. Slimmon, 26 N. Y. 9; Adams v. Irving National Bank, 116 N. Y. 606; Foley v. Greene, 14 R. I. 618; Sharon v. Gager, 46 Conn. 189; Bane v. Detrick, 52 Ill. 19; Fay v. Oatley, 6 Wis. 42.

We do not intimate that a note given in consideration of money embezzled from the payee can be avoided on the ground of duress, merely because the fear of arrest and imprisonment, if he failed to pay, was one of the inducements to the embezzler to make the note. But if the fact that he is liable to arrest and imprisonment is used as a threat to overcome his will and compel a settlement which he would not have made voluntarily, the case is different. The question in every such case is, whether his liability to imprisonment was used against

him, by way of a threat, to force a settlement. If so, the use was improper and unlawful, and if the threats were such as would naturally overcome the mind and will of an ordinary man, and if they overcame his, he may avoid the settlement. The rulings and refusals to rule were correct.

Exceptions overruled.

9 Cyc. 450 (44); 451 (47).

SILSBEE *v.* WEBBER.

171 MASSACHUSETTS, 378.—1898.

Contract, to recover $1150, alleged to have been obtained by duress. The trial judge directed a verdict for defendant and reported the case for the consideration of the Supreme Court.

HOLMES, J. This is an action to recover money alleged to have been got from the plaintiff by duress. In the court below, a verdict was directed for the defendant, and the case was reported. The plaintiff's son had been in the defendant's employ, had been accused by him of stealing the defendant's money, had signed a confession (whether freely or under duress is not material), and had agreed to give security for $1500. There was a meeting between the plaintiff and the defendant, in the course of which, as the plaintiff testified, the defendant said he should have to tell the young man's father, the plaintiff's husband. At that time, according to her, her husband had trouble in his head, was melancholy, very irritable, and unable to sleep, so that she feared that, if he were told, the knowledge would make him insane. The plaintiff further testified that she previously had talked with the defendant about her husband's condition, and that she begged him not to tell her husband, and told him that he knew what her husband's condition was; but that he twice threatened to do it in the course of his inquiries as to what property she had, and that, to prevent his doing so, she, the next day, went, by agreement, to the office of the defendant's lawyer, and executed an assignment of her share in her father's estate. Her son was present, and, as he says, protested that this was extortion and blood money. It is under this assignment that the money sued for was collected.

In the opinion of a majority of the court, if the evidence above stated was believed, we cannot say that the jury would not have been warranted in finding that the defendant obtained and knew that he was obtaining the assignment from the plaintiff solely by inspiring the plaintiff with fear of what he threatened to do; that the ground for her fear was, and was known to be, her expectation of serious effects upon her husband's health if the defendant did as he threatened; and that the fear was reasonable, and a sufficiently powerful motive

naturally to overcome self-interest, and, therefore, that the plaintiff had a right to avoid her act. Harris v. Carmody, 131 Mass. 51, 53, 54; Morse v. Woodworth, 155 Mass. 233, 250.

It is true that it has been said that the duress must be such as would overcome a person of ordinary courage. We need not consider whether, if the plaintiff reasonably entertained her alleged belief, the well-grounded apprehension of a husband's insanity is something which a wife ought to endure, rather than to part with any money, since we are of opinion that the dictum referred to, if taken literally, is an attempt to apply an external standard of conduct in the wrong place. If a party obtains a contract by creating a motive from which the other party ought to be free, and which, in fact, is, and is known to be, sufficient to produce the result, it does not matter that the motive would not have prevailed with a differently constituted person, whether the motive be a fraudulently created belief or an unlawfully created fear. Even in torts,—the especial sphere of external standards,—if it is shown that in fact the defendant, by reason of superior insight, contemplated a result which the man of ordinary prudence would not have foreseen, he is answerable for it; and, in dealing with contributory negligence, the personal limitations of the plaintiff, as a child, a blind man, or a foreigner unused to our ways, always are taken into account. Late American writers repudiate the notion of a general external measure for duress, and we agree with them. Clark, Cont. 357; Bish. Cont. (ed. 1887) § 719. See James v. Roberts, 18 Ohio, 548, 562; Eadie v. Slimmon, 26 N. Y. 9, 12.

The strongest objection to holding the defendant's alleged action illegal duress is that, if he had done what he threatened, it would not have been an actionable wrong. In general, duress going to motives consists in the threat of illegal acts. Ordinarily, what you may do without liability you may threaten to do without liability. See Vegelahn v. Guntner, 167 Mass. 92, 107; Allen v. Flood [1898] App. Cas. 1, 129, 165. But this is not a question of liability for threats as a cause of action, and we may leave undecided the question whether, apart from special justification, deliberately and with foresight of the consequences, to tell a man what you believe will drive him mad, is actionable if it has the expected effect. Spade v. Railroad, 168 Mass. 285, 290; White v. Sander, 168 Mass. 296. If it should be held not to be, contrary to the intimations in the cases cited, it would be only on the ground that a different rule was unsafe in the practical administration of justice. If the law were an ideally perfect instrument, it would give damages for such a case as readily as for a battery. When it comes to the collateral question of obtaining a contract by threats, it does not follow that, because you cannot be made to answer for the act, you may use the threat. In the case of the threat, there are no difficulties of proof, and the relation of cause and effect is as easily

shown as when the threat is of an assault. If a contract is extorted by brutal and wicked means, and a means which derives its immunity, if it have immunity, solely to the law's distrust of its own powers of investigation, in our opinion the contract may be avoided by the party to whom the undue influence has been applied. Some of the cases go further, and allow to be avoided contracts obtained by the threat of unquestionably lawful acts. Morse v. Woodworth, 155 Mass. 233, 251; Adams v. Bank, 116 N. Y. 606; Williams v. Bayley, L. R. 1. H. L. 200, 210.

In the case at bar there are strong grounds for arguing that the plaintiff was not led to make the assignment by the duress alleged. They are to be found in the fact that the plaintiff sought the defendant; in her testimony that when she made the assignment she wanted the defendant to have full security for all her son owed him; and in the plaintiff's later conduct; but we are considering whether there was a case of duress for the jury.

The assignment was on October 10, 1894. Before March 12, 1895, the plaintiff had joined with her sisters in employing a lawyer to secure her share in her father's estate, intending it to be paid over to the defendant. On March 12, 1895, to the same end, she signed a petition for distribution, setting forth the assignment, and afterwards took some further steps, and never made any claim that the assignment was not valid until December, 1895, before which time it had come to the knowledge of her husband. Apart from the weight which these facts may give to the argument that the plaintiff did not act under duress, they found an independent one,—that, if she did act under duress, she has ratified her act. The assignment was formally valid. The only objection to it, if any, was the motive for it. Fairbanks v. Snow, 145 Mass. 153, 154. Therefore it might be ratified by the plaintiff when she was free. But the acts relied on were done in connection with a member of the bar, who had been the defendant's lawyer before he undertook to act for the plaintiff, and who plainly appeared to be acting for the plaintiff only in the defendant's interest. We cannot say that the jury might not find that the later acts of the plaintiff, if not done under the active influence of her supposed original fear, at least were done before the plaintiff had gained an independent foothold, or realized her independence or her rights. We are of opinion that the case should have been left to the jury. Adams v. Bank, 116 N. Y. 606, 614, 615.

KNOWLTON, J., dissented upon the ground that there was not sufficient evidence to go to the jury that defendant knew that telling the father would be likely to drive him insane, or seriously injure his mental condition, and that there was not sufficient evidence that defendant believed that the statement that he should tell her husband would overcome the plaintiff's will. "Upon his understanding of the

facts, such a suggestion would not be expected to overcome the will of a person of ordinary firmness, and there is no evidence that she was supposed by him to be, or that she was in fact, less firm than other women. Whether the rule so often stated in the books, that to avoid a contract on the ground of duress by threats, a threat must be such as would overcome the will of a person of ordinary firmness, be of universal application or not, it undoubtedly furnishes a correct guide in cases in which there is nothing to show that the party who seeks to avoid the contract was not of ordinary courage and firmness." FIELD, C. J., and LATHROP, P., concurred in the dissent.

Verdict set aside. Case to stand for trial.

9 Cyc. 451 (47); W. P. 747 (46).

MARSHALL, J., IN GALUSHA *v.* SHERMAN.

105 WISCONSIN, 263.—1900.

It [duress] is a branch of the law that, in the process of development from the rigorous and harsh rules of the ancient common law, has been so softened by the more humane principles of the civil law and of equity, that the teachings of the older writers on the subject, standing alone, are not proper guides. The change from the ancient doctrine has been much greater in some jurisdictions than in others. There are many adjudications based on citations of authorities not in themselves harmonious, and many statements in legal opinions based on the ancient theory of duress, which together create much confusion on the subject, not only as it is treated by text writers, but by judges in legal opinions.

Anciently, duress in law by putting in fear could exist only where there was such a threat of danger to the object of it as was deemed sufficient to deprive a constant or courageous man of his free will, and the circumstances requisite to that condition were distinctly fixed by law; that is to say, the resisting power which every person was bound to exercise for his own protection was measured, not by the standard of the individual affected, but by the standard of a man of courage; and those things which could overcome a person, assuming that he was a prudent and constant man, were not left to be determined as facts in the particular case, but were a part of the law itself. Co. Litt. 253. . . .

Early in the development of the law, the legal standard of resistance that a person was bound to exercise for his own protection was changed from that of a constant or courageous man to that of a person of ordinary firmness. That will be found by reference to some of the earlier editions of Chitty on Contracts. See 1 Chit. Cont. (11th ed.) p. 272; 2 Greenl. Ev. 301. But the ancient theory that duress was a

matter of law to be determined *prima facie* by the existence or non-existence of some circumstance deemed in law sufficient to deprive the alleged wronged person of freedom of will power, was adhered to generally, the standard of resisting power, however, being changed, so that circumstances less dangerous to personal liberty or safety than actual deprivation of liberty or imminent danger of loss of life or limb, came to be considered sufficient in law to overcome such power. The oppressive acts, though, were still referred to as duress, instead of the actual effect of such acts upon the will power of the alleged wronged person. It is now stated, oftener than otherwise, in judicial opinions, that in determining whether there was or was not duress in a given case, the evidence must be considered, having regard to the assumption that the alleged oppressed person was a person of ordinary courage. . . . Duress, in its broad sense, now includes all instances where a condition of mind of a person, caused by fear of personal injury or loss of limb, or injury to such person's property, wife, child, or husband, is produced by the wrongful conduct of another, rendering such person incompetent to contract with the exercise of his free will power, whether formerly relievable at law on the ground of duress or in equity on the ground of wrongful compulsion.

The making of a contract requires the free exercise of the will power of the contracting parties, and the free meeting and blending of their minds. In the absence of that, the essential of a contract is wanting; and if such absence be produced by the wrongful conduct of one party to the transaction, or conduct for which he is responsible, whereby the other party, for the time being, through fear, is bereft of his free will power, for the purpose of obtaining the contract, and it is thereby obtained, such contract may be avoided on the ground of duress. There is no legal standard of resistance which a party so circumstanced must exercise at his peril to protect himself. The question in each case is, was the alleged injured person, by being put in fear by the other party to the transaction for the purpose of obtaining an advantage over him, deprived of the free exercise of his will power, and was such advantage thereby obtained? If the proposition be determined in the affirmative, no matter what the nature of the threatened injury to such person, or his property, or the person or liberty of his wife or child, the advantage thereby obtained cannot be retained.

The idea is that what constitutes duress is wholly a matter of law and is simply the deprivation by one person of the will power of another by putting such other in fear for the purpose of obtaining, by that means, some valuable advantage of him. The means by which that condition of mind is produced are matters of fact, and whether such condition was in fact produced is usually wholly matter of fact, though of course the means may be so oppressive as to render the re-

sult an inference of law. It is a mistaken idea that what constitutes duress is different in case of an aged person or a wife or child than in case of a man of ordinary firmness. As said in Wolff v. Bluhm (95 Wis. 257), the condition of mind of a person produced by threats of some kind, rendering him incapable of exercising his free will, is what constitutes duress. The means used to produce that condition, the age, sex, and mental characteristics of the alleged injured party, are all evidentiary, merely, of the ultimate fact in issue, of whether such person was bereft of the free exercise of his will power. Obviously, what will accomplish such result cannot justly be tested by any other standard than that of the particular person acted upon. His resisting power, under all the circumstances of the situation, not any arbitrary standard, is to be considered in determining whether there was duress. The more modern text writers so state the law to be. . . .

The true doctrine of duress, at the present day, both in this country and England, is that a contract obtained by so oppressing a person by threats regarding his personal safety or liberty, or that of his property, or of a member of his family, as to deprive him of the free exercise of his will and prevent the meeting of minds necessary to a valid contract, may be avoided on the ground of duress, whether the oppression causing the incompetence to contract be produced by what was deemed duress formerly, and relievable at law as such, or wrongful compulsion remediable by an appeal to a court of equity. The law no longer allows a person to enjoy, without disturbance, the fruits of his iniquity, because his victim was not a person of ordinary courage; and no longer gauges the acts that shall be held legally sufficient to produce duress by any arbitrary standard, but holds him who, by putting another in fear, shall have produced in him a state of mental incompetency to contract, and then takes advantage of such condition, no matter by what means such fear be caused, liable at the option of such other to make restitution to him of everything of value thereby taken from him. . . .

An arbitrary rule, that a threatened lawful arrest and imprisonment implying harsh or unreasonable use of criminal process, and where no warrant has been issued and there is no danger of the threat being immediately carried out, is not sufficient to produce duress, seems unreasonable. Such, however, is the doctrine of the Supreme Court of Maine, and the cases supporting it will be found very generally cited by text writers and judges. That rule goes naturally with the doctrine that every person, without regard to actual mental power, is bound to come up to the standard of average men in that regard or suffer the consequences. . . .

9 Cyc. 451 (47); 26 L. R. A. 48; 26 H. L. R. 255.

Undue influence.

HALL *v.* PERKINS.

3 WENDELL (N. Y.), 626.—1829.

Bill in equity against defendants, as executors, for an accounting. Decree for an accounting. Defendants appeal.

Complainant when nine years old was apprenticed to his maternal grandfather, the testator, it being agreed that he should serve until he was twenty-one and should then receive the sum of $500. After he became twenty-one the testator deeded to him forty acres of land, the deed being executed on an election day in order to make complainant a voter. The deed recited the consideration of $500 and reserved a rent, but was never delivered. After the death of the testator, a settlement took place between defendant, G. H., an uncle of complainant, and the complainant, at which it was agreed that the land should be taken in payment of the $500 and a further sum of $39.58 should be paid complainant for services rendered after he arrived at age. In pursuance of this agreement defendants gave complainant a quit-claim deed of the land and the sum mentioned and complainant gave defendants a receipt in full of all claims against the estate.

SAVAGE, C. J. This is a short and simple case, addressing itself to the common sense and common justice of the plainest man, and seems to require no legal learning to decide it. The deed from the testator to the complainant when executed was a fraud upon the elective franchise; it conveyed no estate, for it was never delivered by the grantor. It was not considered by him as a compensation for services, for he spoke of it as a gift, and at the same time admitted he owed the complainant $500. There can be no dispute that at the death of Rowland Hall the estate honestly owed Perkins $500. How has this acknowledged debt of $500 been paid? I answer by compelling or persuading this simple and ignorant young man to receive the forty acres of rocks in compensation for his services. The land is estimated by some of the witnesses at $4, and by others at $8 or $9; a fair medium is $6. We may therefore consider the land worth $6 per acre, amounting to $240, which these uncles gave their nephew instead of $500 and about two years' interest.

It is said that inadequacy alone is no evidence of fraud. It has indeed been so decided; but inadequacy here does not stand alone. The contracting parties and their capacities should also be considered: on the one side, a simple, uneducated boy, who knew only how to work on a farm; on the other, a man who had been a justice of the peace, and therefore may be presumed to have some knowledge of law. He was no longer a justice, but his practice was that of advocating causes before justices, and probably he was not unacquainted with the tricks

and quibbles which too often disgrace inferior tribunals, and bring a reproach upon that branch of our jurisprudence. The inadequacy then consists, 1. In conveying 40 acres of mountain rocks, worth $240, in satisfaction of a debt of about $565, much less than half; 2. One of the contracting parties arrived at mature age, perfectly acquainted with the value of property, and from his very "vocation," in the habit of taking every advantage which the law would permit; the other an ignorant, simple, unsuspecting boy, unacquainted with property and with the arts and intrigues which too often attend more advanced age; 3. On the one side the uncle, and the other the nephew. The grandfather had hitherto been the guardian and guide of the complainant; and after his decease, to whom could this ignorant youth more naturally look for advice and protection than to his mother's brother, the executor of his grandfather's will, as one every way capable of advising him? The result, however, shows that there was some reason in the ancient law which refused to relations, who might inherit from minors, the guardianship of their persons, because it was, as Lord Coke says, *"quasi agnum lupo committere ad devorandum."* I have thus far cited no authority; it seems to me that none can be necessary beyond an appeal to the moral sense.

It is contended by the appellants that there is not in the bill a sufficient allegation of fraud to justify the admission of evidence on that subject, and if there be a sufficient allegation, there is no evidence of fraud. The bill charges, that if the defendants should produce a receipt in full from the complainant, that such receipt was fraudulently and unjustly obtained. This is sufficient. The ground of the plaintiff's claim was matter of contract, and he resorted to a court of equity because the written contract signed by Rowland Hall was lost or destroyed; the allegation of fraud was in anticipation of the defense contemplated, and it seems to me when thus set up, it need not be so full as if made the substantive ground of complaint. Had the plaintiff below been in possession of the written contract, he might have sued in a court of law, and the question of fraud might have been inquired into in rebutting the defense.

Fraud is often the subject of inquiry in a court of law as well as in equity; there is this difference, however, that at law fraud must be proved; it must be what Lord Hardwicke calls *dolus malus,* actual fraud arising from facts and circumstances of imposition. At law, the contract of every man who is *compos mentis,* is binding and cannot be avoided in general without proof of actual fraud in obtaining it. Neither will a court of equity measure the extent of men's understandings and say there is an equitable incapacity where there is a legal capacity; yet if a weak man gives a bond for a pretended consideration, when in truth there was none or not near so much as is pretended, equity will relieve against it. 3 P. W. 130, 131. Fraud is sometimes

also apparent from the intrinsic nature of the contract. It may be such as no man in his senses and not under delusion would make, and such as no honest and fair man would accept, which is Lord Hardwicke's second class of frauds; and his third is that which may be presumed from the circumstances and condition of the parties contracting. 2 Vesey, Sen. 155, 156.

This case partakes of both the two last classes of frauds, if not of the first. Here was a contract made which no sensible man not under delusion would make, on the one hand, and which no man who had not lost all consciousness of shame would accept, on the other. One of the parties was a weak boy, the other a man of capacity, who may be presumed, from the circumstances of this case, an artful intriguer in small matters. It was a contract made by an unsuspecting youth with a man in whom, from the connection existing between them, he must have reposed confidence, and to whom he naturally looked for advice and protection. It is clearly a case, therefore, where from the nature of the transaction and the situation of the parties, fraud and imposition are to be presumed. 4 Cowen, 220.

I am of opinion the decree of his honor the chancellor should be affirmed with costs.

Mr. Senator S. Allen also delivered an opinion in favor of an affirmance of the decree.

And this being the unanimous opinion of the court, the decree of the chancellor was accordingly affirmed, with costs to be paid by the appellants.[1]

9 Cyc. 456-461 (89-99, 1-16); 463 (21-23); W. P. 744 (35).

GRAY, J., IN DOHENY, *et al.*, Administrators of GLEASON, deceased, *v.* LACEY.

168 NEW YORK, 213.—1901.

The plaintiffs' request assumes that the fact of the existence of "confidential business relations" would throw upon the defendant the burden of proving the fairness and validity of the contract. The defendant was cashier of his uncle's bank and they were intimately associated in business, as in social ways. He, undoubtedly, possessed his uncle's fullest confidence. Granting all that we may as to their confidential relations, they would not bring their dealings within the operation of the rule, which, upon equitable considerations, was adopted at

[1] The relation of an alleged spiritualistic medium to one relying on such medium for advice, and believing implicitly in the existence of the medium's professed power, is one of trust and confidence, and throws on the medium the burden of showing that a contract between the two is free from undue influence. Connor v. Stanley, 72 Cal. 556.

common law and is invoked by the plaintiffs. That rule, within the cases, requires as a basis for its application that a fiduciary relation exist between the parties, which will give to the one, in legal presumption, a controlling influence over the other. Such would be the relation of parent and child, guardian and ward, trustee and *cestui que* trust, physician and patient and attorney and client. In these confidential relations, the situation of the parties is regarded as unequal and as conferring upon one a certain control, or domination, over the will, conduct, and interests of the other. Transactions between them are, therefore, scrutinized closely and presumptions arise of their impropriety, which must be met where an advantage is derived by the presumably dominant party. (Sears v. Shafer, 6 N. Y. 268; Nesbit v. Lockman, 34 ib. 167; Cowee v. Cornell, 75 ib. 91; Matter of Smith, 95 ib. 522.) The presumption is one born of a relation of parties, which would create a situation of more or less dependence by one upon the other. (Smith v. Kay, 7 H. L. Cas. 771.) While in the relations instanced this rule is generally applied, it is, also, extended to other relations of trust, confidence, or inequality; but its application will then demand some previous proof of the trust and confidence, or of the superiority on one side and of the weakness on the other. The law will not presume it from the ordinary relations between persons, in the business world, or in the family connection. The question as to parties so situated is a question of fact dependent upon the circumstances in each case. (Cowee v. Cornell, *supra,* pp. 91–101.) Most of the business relations between persons, in a sense and to a degree, rest upon confidence reposed by the one in the other. Without it, the commercial dealings of the community would be seriously restricted. But the common-law presumption of impropriety, or of unfairness, was not intended to reach such cases; or any cases except those where the circumstances have created what the law regards as a fiduciary relation and where, as a safer general assumption, it regards one as the stronger party and, therefore, as bound, in every transaction with the other, to establish, affirmatively, its good faith and propriety. There was nothing in the relations sustained by the defendant to Gleason, which, of themselves, created any presumption of undue influence, or of undue advantage taken. Whether as president and cashier of their bank, as employer and employé, as capitalist and business manager, or as uncle and nephew, their relations gave rise to no presumptions of inequality in their dealings. Their association was extraordinarily intimate, it may be conceded; but any question about their relations is one of fact and must be determined upon satisfactory extrinsic evidence. I think that no error was committed by the trial judge in holding that the affirmative upon the issue remained with the plaintiffs.

9 Cyc. 458–459 (2–11); W. P. 737 (21).

CHAPTER IV

Legality of Object.

Nature of illegality in contract.

(*i.*) *Contracts which are made in breach of statute.*

a. General rules of construction.

PANGBORN *v.* WESTLAKE.

36 IOWA, 546.—1873.

Action to foreclose a mortgage given by Westlake and wife to Pangborn, to secure the payment of a note.

The defendant Westlake, by his answer, admitted the due execution of the note and mortgage, and that the same was executed to secure the purchase money of the real estate therein described; and also averred that the sale and conveyance of said real estate made by plaintiff to defendant was illegal and contrary to the statute; that the lots sold were embraced in an addition to Maquoketa, which was laid out and platted prior to the sale, but was neither acknowledged or recorded, or filed for record previous to the sale as required by law. To this answer the plaintiff demurred, because the matters contained therein did not constitute any defense to the action. The demurrer was sustained by the court. The defendant appeals, and here assigns that ruling as error.

Cole, J. The single question presented by the demurrer is, whether the contract for the sale of a lot in a town or city, or addition thereto, the plat of which has not been recorded, is void, so that no right of action can be based thereon. Our statute enacts (Rev. § 1027):

"That any person or persons who shall dispose of, or offer for sale or lease, for any time, any out or in lots, in any town, or addition to any town or city, or any part thereof, which has been or shall hereafter be laid out, until the plat thereof has been duly acknowledged and recorded, as provided for in chapter 41 of the Code of Iowa, shall forfeit and pay $50 for each and every lot or part of lot sold or disposed of, leased, or offered for sale."

There is no doubt that the well-settled general rule is that when a statute prohibits or attaches a penalty to the doing of an act, the act is void and will not be enforced, nor will the law assist one to recover money or property which he has expended in the unlawful execution of it; or, in other words, a penalty implies a prohibition though there

are no prohibitory words in the statute, and the prohibition makes the act illegal and void. Bartlett v. Vinor, Carth. 252; Lyon v. Strong, 6 Vt. 219; Robeson v. French, 12 Metc. (Mass.) 24; Gregg v. Wyman, 4 Cush. 322; Pattee v. Greely, 13 Metc. (Mass.) 284; Etna Ins. Co. v. Harvey, 11 Wis. 394; Miller v. Larson, 19 Id. 463; Pike v. King, 16 Iowa, 50, and cases cited; Cope v. Rowlands, 2 Mees. & Welsb. 149, and very numerous other cases there cited. But, notwithstanding this general rule, it must be apparent to every legal mind, that when a statute annexes a penalty for the doing of an act, it does not *always* imply such a prohibition as will render the act void. Suppose, for instance, the act itself expressly provided that the penalty annexed should not have the effect of rendering the act void. Surely in such case the courts would not give such force to the legal implication, under the general rule above quoted, as to override the express negation of it in the statute itself. Then, upon this conclusion, we are prepared for the next step, which is equally plain, that if it is manifest from the language of the statute, or from its subject matter and the plain intent of it, that the act was not to be made void, but only to punish the person doing it with the penalty prescribed, it is equally clear that the courts would readily construe the statute in accordance with its language and its plain intent. We are, therefore, brought to the true test, which is, that while, as a general rule, a penalty implies a prohibition, yet the courts will always look to the language of the statute, the subject matter of it, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment; and if, from all these, it is manifest that it was not intended to imply a prohibition or to render the prohibited act void, the courts will so hold, and construe the statute accordingly. The following cases will abundantly vindicate as well as illustrate this statement of the law: Fergusson v. Norman, 5 Bingham's New Cases, 76 (opinion of Tindal, C. J., p. 83); S. C. in 35 E. C. L. Rep. 37 (*i. e.* 40); Harris v. Runnels, 12 How. (U. S.) 79; Johnson v. Hudson, 11 East, 180; Brown v. Duncan, 10 Barn. & Cress. 93; Hodgson v. Temple, 5 Taunt. 181; Fackler v. Ford *et. al.*, 24 How. (U. S.) 322; The Oneida Bank v. The Ontario Bank, 21 N. Y. 490 (see opinion by Comstock, C. J., on p. 495).

We are relieved from the necessity of making an analysis of and construing our statute as an original interpretation of it, because our statute above quoted, like our general municipal incorporations act, was taken from the Ohio statute, and is essentially the same as that. See Swan's Rev. Stat. of Ohio, Derby's edition, 1854, § 10, p. 940. Prior to our adoption of that statute, it had received a judicial construction by the Supreme Court of that State, and it was held that the penalty did not render the contract illegal, so as to prevent a recovery by the vendor of the consideration agreed to be paid by the vendee,

for a lot sold him prior to the proper survey and making and recording of the plat. Strong &c. v. Darling, 9 Ohio, 201. And it is a well-settled rule that when the legislature of one State adopts a statute from another which has received judicial construction there, such construction will be presumed to have been known to and approved by the legislature, and will be followed by the courts of the State adopting the statute. See Bemis v. Becker, 1 Kan. 226 (*i. e.* 249), where the rule was applied to a statute like the one now in question. Under this rule we must hold that the note and mortgage in this case are not illegal and may, therefore, be enforced.

There are two cases in Missouri, to which our attention has been called, construing a statute similar to ours: Downing v. Ringer, 7 Mo. 585, and Mason v. Pitt, 21 Id. 391. In the former, and apparently without much investigation, it was held, under the general rule first above stated, that the penalty rendered the contract illegal, and that the vendor of a lot in an unrecorded plat could not, under the Missouri statute, recover from the vendee the consideration agreed to be paid therefor. In the last case it was held, that the failure to record the plat prior to the conveyance, did not prevent the title from passing to the vendee. The Kansas court, in Bemis v. Becker, *supra,* followed the last, without referring to the former.

But, further than this, the question has been, in effect, determined by this court in Watrous & Snouffer v. Blair (32 Iowa, 58), where it was held, that the vendees of certain lots, having, as in this case, actual knowledge that at the time of their purchase the plat had not been recorded, were entitled to a specific performance, by their vendor, of their contract of purchase. Surely, we could hardly be expected to compel a vendor to convey, and then to deny him the right to recover the consideration for such conveyance. In that case we required the conveyance to the vendee; in this, we enforce the payment by the vendee.

Affirmed.

9 Cyc. 476–477 (2–5); 12 L. R. A. (N. S.) 575; 16 L. R. A. 423; W. P. 402 (54); 404 (57).

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b. Contracts in breach of Sunday statutes.

HANDY *v.* ST. PAUL GLOBE PUBLISHING CO.

41 MINNESOTA, 188.—1889.

GILFILLAN, C. J. The action is upon a contract pleaded in the complaint, not in *hæc verba,* but according to its supposed effect. The answer denied it; and, on the trial, the plaintiff offered in evidence a written contract between the parties, the provisions of which material to this controversy were as follows: The plaintiff, in consideration of

being allowed the difference between the rates he might charge for advertising in the various issues of the St. Paul Globe newspaper and the rates thereinafter mentioned, agreed and contracted to take entire charge and control of the real-estate advertising business in the daily and Sunday and weekly Globe, and the defendant agreed, in consideration of such services, to put under his full charge and control all real-estate advertising business of defendant in the daily and Sunday and weekly Globe. The plaintiff agreed to pay the defendant certain specified rates for said real-estate advertising, and the defendant agreed to receive said rates as full payment for all said real-estate advertisements which might appear in the daily, weekly, or Sunday Globe, without regard to the amount plaintiff might charge and receive from advertisers. The contract was to continue for the term of five years, with the option in plaintiff to renew it for another term of five years, or for a shorter time; he to have the right to annul the agreement on giving thirty days' notice of his intention to do so. It was admitted by plaintiff, at the time of making the offer of this contract, that the Sunday Globe referred to in the contract was issued, published, and circulated on Sundays, though set up and printed on Saturdays. The contract was objected to as void upon its face for want of mutuality, and as being against public policy; and it appears to have been argued that it was against public policy because it was an agreement for a violation of the law in regard to Sunday. The court below sustained the objection. The plaintiff, of course, failed in his action, and he appeals from an order denying his motion for a new trial. The same objections are made to the contract here as were made below.

The plaintiff contends that, not having pleaded the illegality of the contract, defendant could not assert it on the trial. It is sometimes necessary to plead the facts upon which the illegality of a contract or transaction depends, but it is never necessary to plead the law. When the facts appear, either upon the pleadings or proofs, either party may insist upon the law applicable to such facts. In this case the plaintiff had, under the pleadings, to prove the contract upon which he sued. If it be void on its face, he, not the defendant, showed its illegality.

Though the contract appears in some respects a much more favorable one to the plaintiff than to the defendant, it is not wanting in mutuality of promises and engagements, so as to be without mutual considerations. What the plaintiff is to do appears by implication rather than by express terms. Fairly construed, the contract created the relation of principal and agent between the defendant, as principal, and the plaintiff, as agent, for the management of defendant's real-estate advertising business,—that is, in the charge of procuring advertisements for so much of the space in the defendant's paper as it devoted to real-estate advertising,—and in this business there would

arise the duty in the contract. There was, by implication, the promise of plaintiff to manage the business faithfully, and with due regard to the interest of his principal.

The question of the legality of the contract is, therefore, squarely presented; and with a view to that question, and to some propositions that are made in connection with it, it is necessary to say that the contract is entire, so that any taint of illegality in one part affects the whole of it. There is no way of severing it, so we can say that, although its stipulations as to the Sunday Globe may be in violation of law, and therefore void, yet those as to the daily and weekly Globe may be upheld, or so that, although for what was to be done under it prior to January 1, 1886, when the Penal Code went into effect, it was void, it might yet be upheld for all that it provided for after that date. To attempt that would be to attempt making another contract for the parties,—one that the present contract furnishes no reason to suppose they would have made for themselves. All of the provisions of the contract must, therefore, stand or fall together.

The plaintiff insists that the contract was not illegal, for it neither was executed on Sunday nor required plaintiff or defendant to do anything on Sunday. It bound defendant to maintain and issue a weekly, a daily, and Sunday Globe for the time specified in it, and it required plaintiff's services in the preparation and procuring, so far as related to the real-estate advertisements, of material for each of those editions of the paper. According to the terms of the contract, the defendant was no more at liberty to discontinue its Sunday edition than to discontinue its daily or weekly edition, or all its editions. The theory of the complaint is that it was bound to continue them all; so that, if to issue, publish, and circulate a newspaper on Sunday was against the law as it existed when this contract was made, then the parties contemplated and stipulated for a violation of the law by each. The law in reference to Sunday, in force at the time when the contract was made, was section 20, c. 100, Gen. St. 1878, as follows:

"No person shall keep open his shop, warehouse, or workhouse, or shall do any manner of labor, business, or work, except only works of necessity and charity, on the Lord's day, commonly called Sunday; and every person so offending shall be punished by a fine," etc.

A contract which requires or contemplates the doing of an act prohibited by law is absolutely void. No cases of the kind have been more frequently before the courts than contracts which were made on Sunday, or which required or provided that something prohibited by the statute should be done on Sunday; and in no instance has any court failed to declare such a contract void. Unless the issuing and circulating a newspaper on Sunday is, within the meaning of the statute, a work of necessity, it is prohibited by it as much as any other busi-

ness or work. The newspaper is a necessity of modern life and business, but it does not follow that to issue and circulate it on Sunday is a necessity. There are a great many other kinds of business just as necessary; many, indeed most, kinds of manufactures and mercantile business are indispensable to the present needs of men, but no one would say that, because necessary generally, the prosecution of such business on Sunday is a work of necessity. That carrying on any business on Sunday may be profitable to the persons engaged in it; that it may serve the convenience or the tastes or wishes of the public generally,—is not the test the statute applies. To continue on that day the sale of dry goods or groceries, or the keeping open of markets, saloons, theaters, or places of amusement, might be regarded by many as convenient and desirable, but that would not bring such business within the exception in the statute.

At the time this contract was made, the issuing, publishing, and circulating a newspaper on Sunday was contrary to law; and as the contract provided for that, and as it was indivisible, it was thereby rendered wholly void. The Penal Code went into effect January 1, 1886. Section 229 provides that certain kinds of articles, among them newspapers, may be sold in a quiet and orderly manner on Sunday. Plaintiff contends that the recognition of this contract, and the continuance of business under it for more than a year after the issuance of the Sunday paper became legal by the provisions of the Penal Code, constituted such a ratification of the contract as relieved it of any original taint of illegality. There is a difference in the decisions on the question whether a contract, void merely because it was made on Sunday, may be ratified on a secular day, so as to become valid; but there is no conflict of decisions on the proposition that a contract, void because it stipulates for doing what the law prohibits, is incapable of being ratified. That is this case. The contract contemplated the doing what the law then in force prohibited, and for that reason it was void. It is true, the law was so changed after the contract was made, that, from the time of the change, it became, as plaintiff claims, lawful to do those things provided in the contract which were unlawful at the time it was made, and so that, as he claims, a contract like this, made after the change went into effect, would have been valid. But that could not affect the validity of the previous contract, which was void from the beginning. The parties might have made a new contract to commence on or after January 1, 1886; but, because of the illegality in it, they could not at any time ratify this contract from the beginning; and, because it is entire and indivisible, they could do nothing amounting to less than the making of a new contract, which could give vitality to it for the time since January 1, 1886. An entire contract must be ratified, if at all, as an entirety.

Order affirmed.

37 Cyc. 568–569 (22–29); W. P. 515 (81).

REYNOLDS *v.* STEVENSON.

4 INDIANA, 619.—1853.

DAVISON, J. Debt by the plaintiff in error against the defendant on a promissory note. The note is dated the 1st of April, 1850. The defendant pleaded two pleas. 1. *Nil debet.* 2. That the said note was not made and executed on the day the same bears date; but it was made, executed, and delivered on the 31st of March, 1850, which last-mentioned day was the first day of the week, commonly called Sunday; wherefore the said note was void. Demurrer to the second plea overruled.

A statute in force when this note was given provides that "if any person, etc., shall be found on the first day of the week, commonly called Sunday, rioting, etc., or at common labor, works of charity and necessity only expected, such person shall be fined," etc. There is a proviso to the statute, but it has no bearing in this case. R. S. 1843, c. 53, s. 123.

It is admitted that the note in question was made on Sunday. Then the record presents this question: Did the making of it constitute an act of "common labor"? We think the statute intended to prohibit every description of secular business not within the exceptions pointed out by itself. The executing of this note was secular business, and not embraced by the exceptions. This view is sustained by various adjudications made upon statutes the provisions of which are, in effect, the same as ours. Allen v. Deming, 14 N. H. 133; Towle v. Larrabee, 26 Me. 464; Adams v. Hamell, 2 Doug. (Mich.) 73. In Link v. Clemmens (7 Blackf. 479) it was held "that a replevin bond executed on Sunday was void." This authority is decisive of the case before us. The note, no doubt, was made in violation of the statute. Therefore it must be considered a nullity.

Per Curiam. The judgment is affirmed with costs.[1]

37 Cyc. 563 (64); 13 C. L. R. 545.

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[1] *Contra:* "A contract made on Sunday is not void, and to invalidate a transaction under the statute the contract must necessarily require the act to be performed on Sunday. Boynton v. Page, 13 Wend. 425; Watts v. Van Ness, 1 Hill, 76."—Wright, J., in Merritt v. Earle, 29 N. Y. 117.

Holidays other than Sunday.—"The legal effect of the agreement between the plaintiff and the defendant was to require the defendant, if requested so to do by the plaintiff on the first day of January, 1898, to take plaintiff's stock in the Hoffman Machine Co. at the price named therein. The plaintiff failed to tender his stock and make the request on the day named, but did so on the third of January. As the first day of January was a holiday and the second came on Sunday, the plaintiff insists that his tender and request were in time. But the difficulty with his contention is that legal holidays have not been placed on the same basis as Sunday by the statute. Indeed, in only two respects has the legislature attempted to interfere with

c. Wagers in general.

LOVE *v.* HARVEY.

114 MASSACHUSETTS, 80.—1873.

Contract. The plaintiff and the defendant made a bet as to the place of burial in Holyhood Cemetery of the body of one Dr. Cahill, the plaintiff betting that it was buried on the left-hand side of the main avenue, and the defendant betting that it was buried on the right-hand side of that avenue. The money was deposited, twenty dollars by each party, in the hands of one James Stack as stakeholder. It was determined that the body was buried on the left-hand side of the avenue, yet the stakeholder delivered to the defendant the plaintiff's twenty dollars, and the defendant, though requested, refused to repay the same to the plaintiff. The declaration contained another count for money had and received by the defendant to the plaintiff's use. The answer was a general denial.

The presiding judge ruled and instructed the jury that courts did not sit to decide wagers; that it did not matter whether the plaintiff was right or not, regarding the situation of the burial-place in question, or whether the defendant received from the stakeholder the same money that was deposited with him by the plaintiff, if the money was paid and received as money of the plaintiff; that if, before the money was paid over to the defendant, the plaintiff forbade payment thereof in the defendant's presence, then the defendant received it without consideration and wrongfully, and was liable in the action for money had and received.

GRAY, C. J. In England and in New York, actions on wagers upon questions in which the parties had no previous interest were frequently sustained, until the legislature interposed and declared all wagers to be void. 1 Chit. Con. (11th Am. ed.) 735–738; 3 Kent.

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the ordinary course of business whether public or private on a holiday other than Sunday. The first act provides that a negotiable instrument maturing on a holiday is payable on the next succeeding business day (Laws 1887, chapter 289), and the second that holidays shall be considered as Sunday for all purposes whatsoever, as regards the transaction of business in the public offices of the State or the counties of the State. (Laws 1897, chapter 614, section 1.) If the legislature had omitted the limitation of the preceding statute to the transaction of business in the public offices of the State or counties of the State thus providing that holidays should be considered as Sunday for all purposes whatsoever the plaintiff's contention would be well founded. But in the present state of the statutes, we are of the opinion that upon holidays other than Sunday, all transactions may be carried on as on any other day, with the exceptions above noted."—Page v. Shainwald, 169 N. Y. 246. See, Law of holidays as applied to contracts other than negotiable instruments, 19 L. R. A. 316.

Com. 277, 278. In Scotland, the courts refused to entertain such actions. Bruce v. Ross, 3 Paton, 107, 112; S. C. cited 3 T. R. 697, 705.

In Massachusetts, the English law on this subject has never been adopted, used, or approved, and, although the question has not been directly adjudged, it has long been understood that all wagers are unlawful. Const. Mass. c. 6, art. 6; Amory v. Gilman, 2 Mass. 1, 6; Ball v. Gilbert, 12 Met. 397, 399; Sampson v. Shaw, 101 Mass. 145, 150; Met. Con. 239. There are decisions or opinions to the same effect in each of the New England States. Lewis v. Littlefield, 15 Maine, 233; Perkins v. Eaton, 3 N. H. 152; Hoit v. Hodge, 6 N. H. 104; Collamer v. Day, 2 Vt. 144; West v. Holmes, 26 Vt. 530; Stoddard v. Martin, 1 R. I. 1, 2; Wheeler v. Spencer, 15 Conn. 28, 30. See also Edgell v. M'Laughlin, 6 Whart. 176; Rice v. Gist, 1 Strob. 82.

It is inconsistent alike with the policy of our laws, and with the performance of the duties for which courts of justice are established, that judges and juries should be occupied in answering every frivolous question upon which idle or foolish persons may choose to lay a wager.

The ruling at the trial was therefore correct, and the defendant, having received the money from the stakeholder after notice from the plaintiff not to pay it over, was liable to the plaintiff under the count for money had and received. McKee v. Manice, 11 Cush. 357.

Exceptions overruled.

20 Cyc. 922 (36–40); W. P. 406 (60); 501 (64); 6 H. L. R. 203.

FERGUSON *v.* COLEMAN.

3 RICHARDSON LAW (S. C.), 99.—1846.

This was an action on an instrument, dated 31st January, 1843, whereby the defendant promised "to pay on the first of January, 1844, to W. S. Ferguson or bearer, nine hundred and two dollars, fifty-eight cents, if cotton should rise to eight cents by the first November next, and if not, to pay five hundred dollars, for value received." It was admitted at the trial that this instrument was given in part payment of a tract of land which the defendant had purchased of the plaintiff; and it was proved on the part of the plaintiff, that between the date of the agreement and the first of November, 1843, the highest prices of cotton were, in Columbia, 8½ and 8¾ cents, and in Charleston, 9 and 9¼ cents. The defendant contended, 1st, that the agreement was a wager on the price of cotton.

CURIA, per FROST, J. The objection chiefly urged against the in-

structions of the circuit judge, affects the construction of the agreement to pay the larger sum expressed in the note, "if cotton should rise to eight cents by the first of November next." It appeared by admissions at the trial that the defendant was treating with plaintiff for the purchase of a tract of land; and declining to give the price which the plaintiff asked, it was agreed that the defendant should pay a certain sum if cotton advanced, or less if it did not. . . . The objection to the agreement that it is a wager is plainly inapplicable; for the parties had an interest in the contingency. The defendant purchased the land at the lowest price, unconditionally, but contracted to pay a larger sum if the value should be enhanced by the increased value of its product. . . .

20 Cyc. 921 (30–34); 40 Cyc. 237–238 (88–95); W. P. 405 (59).

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d. Wagers on rise and fall of prices.

MOHR *v.* MIESEN.

47 MINNESOTA, 228.—1891.

Appeal by defendant from an order of the District Court for Ramsey County, refusing a new trial after a verdict of $2005.78 for plaintiffs. The jury found specially that "the arrangement between plaintiffs and defendant with reference to the transaction in controversy contemplated the purchase and sale of actual grain for future delivery, and did not contemplate the making of gambling contracts only," and also that "the contracts in evidence were made by and between the plaintiffs and other members of the chamber of commerce, for the purchase and sale of grain actually to be delivered by warehouse receipts, if either party to them should require it, and that said contracts were not simply gambling contracts."

VANDERBURGH, J. The plaintiffs sue defendant for money paid and expended for his use in the purchase and sale of grain. The answer sets up that the purchases and sales referred to were not actual or veritable purchases and sales of grain, but were merely colorable, and "were gambling transactions, whereby the plaintiffs in form undertook to buy and sell on the Chicago or Milwaukee boards of trade, ostensibly for future deliveries, but without any intention or expectation on the part of the plaintiffs or defendant that the same would be actually delivered, large quantities of wheat and barley, with the expectation and intention on the part of both plaintiffs and defendant of wagering on the market prices, and that the amounts which defendant would win or lose would be governed by and determined upon the fluctuations in the quotations of the boards of

trade." The record shows that the plaintiffs were members of the Milwaukee chamber of commerce, and were brokers negotiating purchases and sales of grain, and accustomed to buy upon margins under the rules of the chamber, and to make advances for customers, and to charge commissions for their services. The defendant during the time of the transactions in controversy was a dealer in wines and liquors in the city of St. Paul. These transactions opened by the receipt by plaintiffs of a telegraphic dispatch from the defendant on November 11, 1886, directing them to "sell ten thousand bushels May wheat." On the following day they accordingly executed the order. February 10th defendant directed the plaintiffs to buy ten thousand bushels May wheat, which order was in like manner executed the same day. This closed the transaction so far as the defendant was concerned. The two contracts were adjusted on the basis of the difference in prices at the dates specified, and a statement showing the difference sent to defendant, that is to say, the two contracts were adjusted on the basis of such difference in prices, without waiting for their literal fulfilment, and without any actual delivery of wheat. A large number of other similar purchases and sales of wheat and barley amounting to hundreds of thousands of bushels, were made by plaintiffs for defendant, and disposed of in like manner, during the year 1887. Some of the "deals" were closed with a profit, others with a loss, to defendant, which was charged up to him by the plaintiffs. During this time the defendant paid out no money for grain whatever, but at plaintiffs' instance, to cover margins for which advances had been made by them on a falling market, he had paid them, between the 10th day of November, 1886, and the 1st day of January, 1888, the sum of $2462.50, leaving due them, as they claim, the amount demanded in this action. The last transactions, as per statement sent to defendant by plaintiffs, were the reported sale of 10,000 bushels February barley, December 30, 1887, and the purchase of 10,000 bushels February barley, January 3, 1888, difference (loss) reported January 4, 1888, at $275.

Contracts for the purchase or sale of grain or other commodities to be delivered at a future time are not *per se* unlawful, if the parties intend in good faith to perform them by the actual delivery of the property according to their terms. Nor are *bona fide* contracts for the future delivery of goods invalid because at the time of the sale the vendor has not the actual or potential possession of the goods which he has agreed to sell. He may afterwards go into the market and procure the goods which he has agreed to furnish his vendee. Business may be successfully and lawfully conducted in that way; and, where such contracts are intended in good faith to represent actual transactions, they are not unlawful. The law places no unreasonable limitations upon commercial dealings; and it is no

legal ground of objection that *bona fide* contracts for future delivery are entered into for the purpose of making a speculation through an anticipated rise in the price of commodities. But contracts in form for the future delivery of goods not intended to represent actual transactions,—that is, the actual delivery and receipt of the goods, —but merely to pay and receive the difference between the agreed price and the market price at a future day, and upon the risk of the rise or fall in prices, are generally held to be in the nature of wagers on the future price of the commodity, and void by statute or as against public policy. The party dealing in futures in substance bets that the price of a commodity at a future day will be a certain sum more or less than the market prices, which involve elements of risk and uncertainty; and the "stake" is the amount of the "margin" required to cover differences in values, and according to the price of the commodity on a future day the parties to the contract must respectively gain or lose. 22 Am. La Reg. 613, note.

In Rumsey v. Berry (65 Me. 570) the accepted doctrine is stated as follows:

"A contract for the sale and purchase of wheat to be delivered in good faith at a future time is one thing, and is not inconsistent with the law; but such a contract entered into without an intention of having any wheat pass from one party to the other, but with an understanding that at the appointed time the purchaser is merely to receive or pay the difference between the contract and the market price, is another thing, and such as the law will not sustain. This is what is called a settling of the differences, and as such is clearly and only a betting upon the price of wheat, against public policy, and not only void, but deserving of the severest censure."

"The bargain represents not a transfer of property, but a mere stake or wager upon its future price. The difference requires the ownership of only a few hundreds or thousands of dollars, while the capital to complete an actual purchase or sale may be hundreds of thousands or millions. Hence ventures upon prices invite men of small means to enter into transactions far beyond their capital, which they do not intend to fulfil, and thus the apparent business in the particular trade is inflated and unreal, and, like a bubble, needs only to be pricked to disappear, often carrying down the *bona fide* dealer in its collapse. . . . Such transactions are destructive of good morals and fair dealing and of the best interests of the community." Kirkpatrick v. Bonsall, 72 Pa. St. 155.

It becomes material, therefore, to inquire into the intention of the parties in entering into contracts purporting to be for the future delivery of commodities, and the plaintiffs must be shown to be *in pari delicto* to defeat a recovery in this action. The language or form of the contract is not conclusive. The real nature of the transaction and the understanding and purpose of the parties may be shown, notwithstanding the contract is fair on its face. Indeed, in view of the extent to which stock and grain gambling is carried on at the exchanges in the commercial centers of the country,—a fact of which

the courts are bound to take notice,—time contracts of the character under consideration will be very carefully scrutinized by the courts, and they will go behind and outside the language of the contract, and look into the facts and circumstances surrounding and connected with it, in order to determine its real character, as in the case of contracts claimed to be void for usury or fraud. In Barnard v. Backhaus (52 Wis. 593, 600), the court, speaking of contracts for future delivery, went so far as to say that "to justify a court in upholding such an agreement it is not too much to require a party claiming rights under it to make it satisfactorily and affirmatively appear that the contract was made with an actual view to the delivery and receipt of grain, not as an evasion of the statute against gaming, or as a cover for a gambling transaction." The effect of this would be to shift the burden of proof in such cases. The courts of some of the other States have been constrained to adopt the same rule, but upon principle the proposition can hardly be sustained; and the general rule is that the burden of establishing the illegality rests upon the party who asserts it, and such is the great weight of authority in these as well as other cases. It is for the legislature to change the rule in this class of cases, if in its wisdom and for reasons of public policy it shall be deemed necessary for the public welfare. Crawford v. Spencer, 92 Mo. 498, and cases.

The testimony of the defendant, which is undisputed, shows or tends to show that he did not intend to make actual *bona fide* purchases and sales of grain, but intended to "deal in futures" solely, and the manner in which the business was conducted and the several "deals" closed and adjusted by the plaintiffs is consistent with this theory, and tends to support it; and, while this circumstance might not alone be sufficient to establish the fact that plaintiffs, or the third parties with whom they dealt in executing the orders of the defendant, had notice that defendant's object was not to buy and sell grain, but to speculate in the price of grain merely, yet the manner in which the business involving these transactions was conducted was certainly an element to be considered with other circumstances in determining the question of their good faith. Hill v. Johnson, 38 Mo. App. 383; Crawford v. Spencer, 92 Mo. 498. It is not necessary to prove that plaintiffs had express notice of defendant's purpose. The understanding between the parties may be gathered from the facts and attending circumstances. This is well settled, and upon this point evidence of the defendant's occupation, residence, financial ability; that he never delivered or received or proposed to deliver or receive any grain; that he was not a dealer; and that the orders to purchase were made without reference to or far in excess of his ability to pay for, with other facts of like character, was competent. Cobb v. Prell, 5 McCrary, 85; Carroll v. Holmes, 24 Ill. App. 453,

458, 459; *In re* Green, 7 Biss. 338, 344; Crawford v. Spencer, *supra;* Lowry v. Dillman, 59 Wis. 197; Sprague v. Warren (Neb.), 41 N. W. Rep. 1115; Watte v. Wickersham, 27 Neb. 457; Williams v. Tiedemann, 6 Mo. App. 269, 276; Hill v. Johnson, 38 Mo. App. 383, 392. The plaintiffs concede that it was apparent from his correspondence that the defendant's transactions were mostly for speculative purposes. They knew he was in the saloon business, and not in the grain business. The jury might find from the facts disclosed by the evidence that the plaintiffs knew that he had not the means to buy grain with, and did not desire or need it, but was operating for the differences only.

The statutes of Wisconsin, where the business was done, were not introduced in evidence. The rights of the parties will therefore be determined by the rules of the common law, as generally accepted and applied in this country. Harvey v. Merrill, 150 Mass. 1. And it is generally held as the common-law doctrine that all wagering contracts are illegal and void as against public policy. Irwin v. Williar, 110 U. S. 499, 510; Harvey v. Merrill, *supra.* No cause of action arises in favor of a party to an illegal transaction; nor will the law lend its aid to enforce any contract which is in conflict with the terms of a statute, or sound public policy or good morals. *In re* Green, 7 Biss. 338; Armstrong v. Toler, 11 Wheat. 258; Ruckman v. Bryan, 3 Denio, 340. And there is no reason why a broker or commission merchant should be favored or exempted from consequences resulting to other parties who aid or assist in unlawful transactions. Barnard v. Backhaus, *supra.* It was through the agency of the plaintiffs that the defendant was attempting to carry on an unlawful business. They executed his orders, advanced money for margins, and settled the differences. The contracts were all made in their names, and he was not known in the transactions with third parties, and they were personally responsible to the persons with whom they dealt in making the purchases and sales in question. Under such circumstances it would, of course, be difficult to ascertain whether the latter had notice of the nature of the agreement or understanding existing between the parties to this action; but it was clearly important and material to show that the plaintiffs were cognizant of defendant's illegal purposes, and were engaged in promoting them; and, if they were, the court will not aid them to recover moneys advanced in furtherance of such schemes. The plaintiffs, as brokers or commission merchants, might well decline to aid in transactions of that character; and, if they would do so, a great deal of that kind of gambling would cease, as, in the majority of cases, the ventures could not be made without their financial assistance. As between them and their customers, the same strict

rule should be applied as in other cases. Carroll v. Holmes, 24 Ill. App. 453, 460; Hill v. Johnson, 38 Mo. App. 383; Tied. Sales, p. 490, § 302.

The plaintiffs' counsel, however, concedes in his brief in this court that if, by the arrangement between the parties to this suit, they were to undertake gambling transactions, then the intent of third parties was not material. But the defendant's counsel insists that the charge of the court on this subject, including the instructions asked by plaintiffs, would warrant the jury to infer that it was necessary for the defendant to make it appear that the parties with whom plaintiffs dealt were also *in pari delicto*. Upon this point the charge, taken as a whole, is perhaps not entirely clear, but we think if there was any ambiguity or uncertainty in the charge on the question the defendant should have asked more specific instructions.

It is also assigned as error that the court erred in refusing defendant's second request to charge, which was in substance that, in order to prove notice or knowledge on the part of the plaintiffs of the designs and intentions of the defendant, it is not necessary that defendant should have written or said to any of the plaintiffs that such was his design; but the jury were to determine the understanding of the parties from all the circumstances connected with the transactions between them, and that upon this question they were "entitled to consider the fact that at the time the plaintiffs sold the barley for the defendant in October, November, and December, 1887, one of the plaintiffs stated that he had no reason to believe that the defendant had the barley at the time of such sales; and the further fact that during a part, at least, of the time of such transactions, the defendant was behind with his margin, and was being pressed by plaintiffs for money to make the margins good; and that plaintiffs immediately after closed these deals, as well as all prior deals, considered the transaction at an end so far as defendant was concerned, and, instead of charging him with the purchase of any wheat, sent him statements charging him with, or crediting him with, as the case might be, the difference between the purchase and the selling price." These instructions were not covered by the general charge, and we think should have been given. Some of the evidence was perhaps of slight importance, but we think, with other facts and circumstances in the case, it was all proper to be considered by the jury in determining the knowledge of the plaintiffs and the real nature of the arrangement between the parties; and without such instructions the jury were in danger of being led to believe, as the court subsequently stated, that there must be an express agreement, and that a mere understanding between the parties was not sufficient.

We think evidence of the general character of transactions in the

chamber between other dealers was properly rejected; but for the error above referred to there should be a new trial.

Order reversed.[1]

20 Cyc. 926-927 (57-58); W. P. 406 (60).

ASSIGNED ESTATE OF L. H. TAYLOR & COMPANY. (Appeal of WILLIAM H. HOWARD.)

192 PENNSYLVANIA STATE, 304.—1899.

Exception to auditor's report, which was as follows:

Claim of W. H. Howard for $11,921.62. Mr. Howard is a capitalist and a farmer. On March 13, 1893, he bought 100 shares of L. C. & N. Co. for $4337.50, and the next day paid L. H. Taylor & Co. $2000. During the month of April, 1893, he appears to have ordered bought and sold about 1200 shares of stock. On April 30, 1893, he ordered sold "short" 100 shares of B. & O. and 100 shares of P. R. & N. E. In November, 1895, he again turned "bear," selling "short" in that single month 500 shares of Reading R. Co., 200 shares of American Tobacco Co., 100 shares of Welsbach Light Co.

[1] "As has appeared, the plaintiff's chamber of commerce [Chicago Board of Trade] is, in the first place, a great market, where, through its eighteen hundred members, is transacted a large part of the grain and provision business of the world. Of course, in a modern market contracts are not confined to sales for immediate delivery. People will endeavor to forecast the future and to make agreements according to their prophecy. Speculation of this kind by competent men is the self-adjustment of society to the probable. Its value is well known as a means of avoiding or mitigating catastrophes, equalizing prices and providing for periods of want. It is true that the success of the strong induces imitation by the weak, and that incompetent persons bring themselves to ruin by undertaking to speculate in their turn. But legislatures and courts generally have recognized that the natural evolutions of a complex society are to be touched only with a very cautious hand, and that such coarse attempts at a remedy for the waste incident to every social function as a simple prohibition and laws to stop its being are harmful and vain. This court has upheld sales of stock for future delivery and the substitution of parties provided for by the rules of the Chicago Stock Exchange. Clews v. Jamieson, 182 U. S. 461. . . . There is no doubt, from the rules of the Board of Trade or the evidence, that the contracts made between the members are intended and supposed to be binding in manner and form as they are made. There is no doubt that a large part of those contracts is made for serious business purposes. Hedging, for instance, as it is called, is a means by which collectors and exporters of grain or other products, and manufacturers who make contracts in advance for the sale of their goods, secure themselves against the fluctuations of the market by counter contracts for the purchase or sale, as the case may be, of an equal quantity of the product, or of the material of manufacture. It is none the less a serious business contract for a legitimate and useful purpose that it may be offset before the time of delivery in case delivery should not be needed or desired."—Board of Trade of the City of Chicago v. Christie Grain & Stock Co., 198 U. S. 236.

In December, 1895, he also made short sales of Welsbach Light Co. and American Sugar Refining Co. common. The account had been closed in 1893, but reopened thereafter. No stock was delivered to him after March 13, 1893, when the account was reopened. He testified that he did not intend to gamble. The account, however, including his enormous short sales, has all the earmarks of a gaming transaction, and I so find. I disallow the claim.

MITCHELL, J. It has been settled by this court, so often that it ought not to require reiteration, that dealing in stocks, even on margins, is not gambling. Stocks are as legitimate subjects of speculative buying and selling as flour or dry goods or pig iron. A man may buy any commodity, stock included, to sell on an expected rise, or sell "short," to acquire and deliver on an expected fall, and it will not be gambling. Margin is nothing but security, and a man may buy on credit, with security or without, or on borrowed money, and the money may be borrowed from his broker as well as from a third person. The test is, did he intend to buy, or only to settle on differences? If he had bought and paid for his stock, held it for a a year and then sold, no one would call it gambling; and yet it is just as little so if he had it but an hour, and sold before he had in fact paid for it. And so with selling. Every merchant who sells you something not yet in his stock, but which he undertakes to get for you, is selling "short," but he is not gambling, because, though delivery is to be in the future, the sale is present and actual.

The true line of distinction was laid down in Peters v. Grim (149 Pa. St. 163) and has not been departed from or varied: "A purchase of stock for speculation, even when done merely on margin, is not necessarily a gambling transaction. If one buys stock from A, and borrows the money from B to pay for it, there is no element of gambling in the operation, though he pledges the stock with B as security for the money. So, if instead of borrowing the money from B, a third person, he borrows it from A, or, in the language of brokers, procures A to 'carry' the stock for him, with or without margin, the transaction is not necessarily different in character. But in this latter case, there being no transfer or delivery of the stock, the doubt arises whether the parties intended there should ever be a purchase or delivery at all. Here is the dividing line. If there was not under any circumstances to be a delivery, as part of and completing a purchase, then the transaction was a mere wager on the rise and fall of prices; but if there was, in good faith, a purchase, then the delivery might be postponed, or made to depend on a future condition, and the stock carried on margin, or otherwise, in the meanwhile, without affecting the legality of the operation." This has been uniformly followed. Hopkins v. O'Kane, 169 Pa. St. 478; Wagner v. Hildebrand, 187 Pa. St. 136. And the rule goes so far that an agreement

for an actual sale and purchase will make the transaction valid, though it originated in an intention merely to wager. Anthony v. Unangst, 174 Pa. St. 10.

Turning now to the facts of the present case, it is clear that the law was not correctly applied by the auditor and the court below. The brokers made an assignment on December 21, 1895, on which day they held certain stock for appellant, which they had bought on his order; and he had certain other stock, which they had sold on his order, but which he had not yet delivered to them. He desired to close the account, complete the mutual deliveries, and receive the balance which the transactions left in his favor. He was entitled to do so. Even if the transactions were wagering the agreement of the parties to make the sales actual would, under Anthony v. Unangst (174 Pa. St. 10), have made them valid. It is true, the settlement was not actually made until January 10th; but it was made as of December 20th, the day before the assignment, and the auditor reports that there had been no change of values meanwhile. The time of striking a balance on the books and delivering the stock was not important. Delivery is not in itself a material fact. Its only value is as evidence of the intent to make a *bona fide* sale. If such is the intent, the delivery may be present or future without affecting validity.

But there was no sufficient evidence that the transactions were illegal at any time. The auditor reports that "the stocks ordered to be bought or sold by the customers of L. H. Taylor & Co. were, as shown by their books, actually bought and sold; and, as this evidence is uncontradicted, I must and do so find. . . . Thus, so far as L. H. Taylor & Co. were concerned, the transactions were not fictitious, but were actual purchases and sales of stock." This finding should have been a warning to caution in taking a different view of the appellant's position in the transactions. It is true, the purchase or sale may be actual on part of the broker, and merely a wager on part of the customer (see Champlin v. Smith, 164 Pa. St. 481); but there should be at least fairly persuasive evidence of the difference. There is none here. The transactions covered by the account began with a small cash balance to appellant's credit, followed by an order to buy 200 shares of Wabash common, which were bought by the brokers, paid for by appellant, and delivered to him. The close, two years and a half later, showed, as already said, a large number of shares in the hands of the brokers bought for appellant, and of which he demanded delivery, and other shares sold for him and which he had in his possession ready to deliver. As to the intermediate transactions, appellant testified, "It was always the intention to buy the stocks out and out, and pay for them, and I had money to do it with." In the face of these facts and this uncon-

tradicted testimony, the auditor found that "the account, including his enormous short sales, has all the earmarks of a gaming transaction, and I so find it." This was a mere inference, unwarranted by the account itself, and wholly opposed to all the evidence in the case.

Judgment so far as it relates to appellant's claim, reversed, and claim directed to be allowed.

20 Cyc. 928 (59); W. P. 408 (63).

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e. Wagering policies.

WARNOCK *v.* DAVIS.

104 UNITED STATES, 775.—1881.

Action to recover a balance on a life insurance policy issued to plaintiff's intestate and by him assigned to defendants to whom the policy was paid. Judgment for defendants. Plaintiff brings error.

The intestate entered into an agreement with defendants that he would take out a policy for $5000 and assign nine-tenths of the same to defendants, one-tenth to be payable to his wife; that he would pay defendants $6 in hand and annual dues amounting to $2.50. They on their part agreed to keep up the annual premiums on the policy, and on the death of intestate collect and pay over to his widow one-tenth of the policy. In pursuance of this agreement a policy was taken out by the intestate and assigned to defendants on the terms stipulated. On the death of intestate the defendants collected the policy and paid over to the widow one-tenth of the amount, less certain sums due under the agreement. Plaintiff, as administrator, brings an action for the balance of the money collected under the policy.

Mr. Justice Field. As seen from the statement of the case, the evidence before the court was not conflicting, and it was only necessary to meet the general allegations of the first defense. All the facts established by it are admitted in the other defenses. The court could not have ruled in favor of the defendants without holding that the agreement between the deceased and the Scioto Trust Association was valid, and that the assignment transferred to it the right to nine-tenths of the money collected on the policy. For alleged error in these particulars the plaintiff asks a reversal of the judgment.

The policy executed on the life of the deceased was a valid contract, and as such was assignable by the assured to the association as security for any sums lent to him, or advanced for the premiums and assessments upon it. But it was not assignable to the association for any other purpose. The association had no insurable interest in

the life of the deceased, and could not have taken out a policy in its own name. Such a policy would constitute what is termed a wager policy, or a mere speculative contract upon the life of the assured, with a direct interest in its early termination.

It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation; for a parent has an insurable interest in the life of his child, and a child in the life of his parent, a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful—as operating more efficaciously—to protect the life of the insured than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are, therefore, independently of any statute on the subject, condemned, as being against public policy.

The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name. Nor is its character changed because it is for a portion merely of the insurance money. To the extent in which the assignee stipulates for the proceeds of the policy beyond the sums advanced by him, he stands in the position of one holding a wager policy. The law might be readily evaded, if the policy, or an interest in it, could, in consideration of paying the premiums and assessments upon it, and the promise to pay upon the death of the assured a portion of its proceeds to his representatives, be transferred so as to entitle the assignee to retain the whole insurance money.

The question here presented has arisen, under somewhat different circumstances, in several of the state courts; and there is a conflict in their decisions. In Franklin Life Insurance Company v. Hazzard, which arose in Indiana, the policy of insurance, which was for $3000, contained the usual provision that if the premiums were not paid at the times specified the policy would be forfeited. The second premium was not paid, and the assured, declaring that he had concluded not to keep up the policy, sold it for twenty dollars to one

having no insurable interest, who took an assignment of it with the consent of the secretary of the insurance company. The assignee subsequently settled with the company for the unpaid premium. In a suit upon the policy, the Supreme Court of the State held that the assignment was void, stating that all the objections against the issuing of a policy to one upon the life of another, in whose life he has no insurable interest, exist against holding such a policy by mere purchase and assignment. "In either case," said the court, "the holder of such policy is interested in the death rather than the life of the party assured. The law ought to be, and we think it clearly is, opposed to such speculations in human life." 41 Ind. 116. The court referred with approval to a decision of the same purport by the Supreme Court of Massachusetts, in Stevens v. Warren, 101 Mass. 564. There the question presented was whether the assignment of a policy by the assured in his lifetime, without the assent of the insurance company, conveyed any right in law or equity to the proceeds when due. The court was unanimously of opinion that it did not; holding that it was contrary not only to the terms of the contract, but contrary to the general policy of the law respecting insurance, in that it might lead to gambling or speculative contracts upon the chances of human life. The court also referred to provisions sometimes inserted in a policy expressing that it is for the benefit of another, or is payable to another than the representatives of the assured, and, after remarking that the contract in such a case might be sustained, said, "that the same would probably be held in the case of an assignment with the assent of the assurers. But if the assignee has no interest in the life of the subject which would sustain a policy to himself, the assignment would take effect only as a designation, by mutual agreement of the parties, of the person who should be entitled to receive the proceeds when due, instead of the personal representatives of the deceased. And if it should appear that the arrangement was a cover for a speculating risk, contravening the general policy of the law, it would not be sustained."

Although the agreement between the Trust Association and the assured was invalid as far as it provided for an absolute transfer of nine-tenths of the proceeds of the policy upon the conditions named, it was not of that fraudulent kind with respect to which the courts regard the parties as alike culpable and refuse to interfere with the results of their action. No fraud or deception upon any one was designed by the agreement, nor did its execution involve any moral turpitude. It is one which must be treated as creating no legal right to the proceeds of the policy beyond the sums advanced upon its security; and the courts will, therefore, hold the recipient of the moneys beyond those sums to account to the representatives of the deceased. It was lawful for the association to advance to the assured

the sums payable to the insurance company on the policy as they became due. It was, also, lawful for the assured to assign the policy as security for their payment. The assignment was only invalid as a transfer of the proceeds of the policy beyond what was required to refund those sums, with interest. To hold it valid for the whole proceeds would be to sanction speculative risks on human life, and encourage the evils for which wager policies are condemned.

The decisions of the New York Court of Appeals are, we are aware, opposed to this view. They hold that a valid policy of insurance effected by a person upon his own life, is assignable like an ordinary chose in action, and that the assignee is entitled, upon the death of the assured, to the full sum, payable without regard to the consideration given by him for the assignment, or to his possession of any insurable interest in the life of the assured. St. John v. American Mutual Life Insurance Company, 13 N. Y. 31; Valton v. National Fund Life Assurance Company, 20 Id. 32. In the opinion in the first case the court cite Ashley v. Ashley (3 Simons, 149) in support of its conclusions; and it must be admitted that they are sustained by many other adjudications. But if there be any sound reason for holding a policy invalid when taken out by a party who has no interest in the life of the assured, it is difficult to see why that reason is not as cogent and operative against a party taking an assignment of a policy upon the life of a person in which he has no interest. The same ground which invalidates the one should invalidate the other;—so far, at least, as to restrict the right of the assignee to the sums actually advanced by him. In the conflict of decisions on this subject we are free to follow those which seem more fully in accord with the general policy of the law against speculative contracts upon human life.

In this conclusion we are supported by the decision in Cammack v. Lewis, 15 Wall. 643. There a policy of life insurance for $3000, procured by a debtor at the suggestion of a creditor to whom he owed $70, was assigned to the latter to secure the debt, upon his promise to pay the premiums, and, in case of the death of the assured, one-third of the proceeds to his widow. On the death of the assured, the assignee collected the money from the insurance company and paid to the widow $950 as her proportion after deducting certain payments made. The widow, as administratrix of the deceased's estate, subsequently sued for the balance of the money collected, and recovered judgment. The case being brought to this court, it was held that the transaction, so far as the creditor was concerned, for the excess beyond the debt owing to him, was a wagering policy, and that the creditor, in equity and good conscience, should hold it only as security for what the debtor owed him when it was assigned, and for such advances as he might have afterwards made on account of it; and

that the assignment was valid only to that extent. This decision is in harmony with the views expressed in this opinion.

The judgment of the court below will, therefore, be reversed, and the cause remanded with direction to enter a judgment for the plaintiff for the amount collected from the insurance company, with interest, after deducting the sum already paid to the widow, and the several sums advanced by the defendants; and it is

So ordered.

25 Cyc. 702 (27).

(*ii.*) *Contracts illegal at common law.*

In general.

MATERNE *v.* HORWITZ.

101 NEW YORK, 469.—1886.

Action for damages for refusal to accept goods tendered under contract of sale. Complaint dismissed. Plaintiff appeals from judgment of the General Term of New York City Superior Court affirming judgment. (Reported 18 J. & S. 41, where the facts appear.)

Plaintiffs sold defendants 400 cases of "domestic sardines," the boxes to have "fancy labels" on them. Domestic sardines were fish packed in Maine, and fancy labels were decorated labels containing a statement in substance that the sardines were packed in France in olive oil by persons named on the label. Imported sardines were worth about 50 per cent more than domestic. The goods tendered had on them labels as described. Plaintiffs and defendants were wholesale dealers.

MILLER, J. It must be assumed, we think, that the defendants knew when the agreement was made that they intended to purchase sardines of the kind that were tendered to them, and that the plaintiffs understood that the defendants knew it. It is also inferable that the defendants entered into the agreement, to the knowledge of the plaintiffs, for the purpose of selling the goods to others in the condition in which they were when delivered. It is also evident that the labels were used to deceive the consumers and not the contractors, and to obtain higher prices for the sardines. The plaintiffs procured and furnished the deceptive labels, after binding themselves by contract to do so, and this was done for an unlawful purpose, and with a view of furnishing goods for the market in a condition calculated to deceive the consumers who might purchase them. It is, therefore, apparent that it was part of the contract that an unlawful object was intended, of which both parties were cognizant, and that it was designed by them, under the contract, to commit a fraud and thus

promote an illegal purpose by deceiving other parties. In such a case the courts will not aid either party in carrying out a fraudulent purpose.

To carry out this contract would be contrary to public policy, and in such a case, as we have seen, the court will not aid either party.

Under the Penal Code (§ 438), it is made a misdemeanor to sell or offer for sale any package falsely marked, labeled, etc., as to the place where the goods were manufactured, or the quality or grade, etc. The contract in question would seem to be covered by this provision of the Code, but as the Penal Code did not go into effect until May 1, 1882, and this contract was made June 30, 1881, the section cited has, we think, no bearing on the question presented.

The case was properly disposed of upon the ground first stated, which is fully considered and elaborated in the opinion of the General Term, Sedgwick, J., in which we concur.

The judgment should be affirmed. All concur.

Judgment affirmed.[1]

9 Cyc. 468 (52–58); 469 (72–77); W. P. 376 (5); 419 (n); 485 (42).

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[1] Where a note was given for the sale of "prolific oats" at fifteen dollars a bushel, the payee agreeing to sell eighty bushels for the maker the next year at fifteen dollars a bushel, the court said: "That this contract is void as being against public policy, we have no doubt. Any contract that binds the maker to do something opposed to the public policy of the State or nation, or that conflicts with the wants, interests or prevailing sentiment of the people, or our obligations to the world, or is repugnant to the morals of the times, is void. Any contract which has for its object the practice of deception upon the public, or upon any party in interest as to the ownership of property, the nature of a transaction, the responsibility assumed by an obligation, or which is made in order to consummate a fraud upon the people or upon third persons, is void. Greenh. Pub. Pol. 136, 152. This contract is so out of the usual course of dealings as to awaken suspicion of its fairness. Ordinarily, contracts are made upon the basis of what is believed to be actual values, but this is confessedly upon the basis of most extravagant and unreal values. To carry out this contract eighty bushels of grain had to be sold to some person on or before September 1, 1888, for more than thirty times their value. This could only be done by grossly deceiving the purchaser as to their value, or repeating the scheme upon which this contract was made, or one similar. That such a scheme could not be repeated year after year is evident, so that in the end some person must be deceived into paying many times the value of the oats. If it was not intended upon the part of the company to carry out the contract, then the fraud was consummated the sooner. View the transaction as you may, and it discloses a cunningly-devised plan to cheat and defraud. 'Whenever any contract conflicts with the morals of the time and contravenes any established interests of society, it is void as being against public policy.' Story, Confl. Laws, sec. 546. Surely a contract that cannot be performed without deception and fraud conflicts with the morals of the time, and contravenes the established interest of society. There was no error in instructing the jury that this contract is fraudulent and void as between the original parties to it. In this connection, see McNamara v. Gargett, 68 Mich. 454; 36 N. W. Rep. 218, wherein the Supreme Court of Michigan held a similar contract void

JOHNSTON *v.* FARGO.

184 NEW YORK, 379.—1906.

GRAY, J. The plaintiff, while in the employment of the American Express Company, the defendant, sustained personal injuries, for which he has recovered this judgment in the Municipal Court of the city of Syracuse, which has been affirmed by the County Court of Onondaga county and by the Appellate Division of the Supreme Court in the Fourth Department. The latter court was divided in opinion and has permitted the defendant to further appeal to this court, upon the ground that there was a question of law in the case which ought to be reviewed by us. The injuries were occasioned by the plaintiff's falling with an elevator, or lift, in the barn of the express company, while it was being used for carrying down some vehicles, and the complaint charges that it was in a defective condition and that the occurence was due to the fault or negligence of the defendant. The evidence upon the trial was such as to raise questions of fact as to the negligence of the defendant and as to the contributory negligence of the plaintiff, and those questions were properly submitted by the trial court for the determination of the jury. They demand no further consideration by us. The one question for discussion upon this appeal is the sufficiency of the defense made by the company upon an agreement which the plaintiff, upon entering the defendant's employment, executed and delivered to it. It was in these words: "I do further agree, in consideration of my employment by said American Express Company, that I will assume all risks of accident or injury which I shall meet with or sustain in the course of such employment, whether occasioned by the negligence of said company, or any of its members, officers, agents, or employés, or otherwise, and that, in case I shall at any time suffer any such injury, I will at once execute and deliver to said company a good and sufficient release, under my hand and seal, of all claims, demands, and causes of action arising out of such injury, or connected therewith, or resulting therefrom; and I hereby bind myself, my heirs, executors, and administrators, with the payment to said express company, on demand, of any sum which it may be compelled to pay in consequence of any such claim, or in defending the same, including all counsel fees and expenses of litigation connected therewith." In submitting the case to the jury, the trial judge charged as follows with respect to this defense: "There is a clause in the contract which provides that the plaintiff shall release the defendant from any injuries which he

as being against public policy. True, in that case the contract is said to be a gambling contract, but it is declared to be against public policy on other grounds."—Given, J., in Merrill v. Packer, 80 Iowa, 542.

might suffer by reason of the negligence of the defendant. I shall hold as matter of law that that clause in that contract is void as being without consideration and as against public policy." At the Appellate Division the judgment was upheld on this point upon the ground that the agreement was contrary to public policy, and therefore invalid, and Mr. Justice Hiscock, who delivered the opinion of the court, has presented the reasoning in support of that view very fully and ably.

The question is one upon which this court has not pronounced itself and it is of considerable importance, touching as it does the principle of freedom of contract. In the case of Purdy v. R., W. & O. R. R. Co., 125 N. Y. 209, 26 N. E. 255, 21 Am. St. Rep. 736, such a contract to release the employer from liability for injury through negligence was involved; but it was held to have been void for being without the support of any consideration. It was said that no intimation was intended that it would have been valid if there had been a consideration for it, and that "it might even then be urged that public policy forbids the exaction of such a contract from its employés by railroad and other corporations, and upon that question we desire to express no opinion at the present time." In Kenney v. N. Y. C. & H. R. R. R. Co., 125 N. Y. 422, 26 N. E. 626, the contract for exemption from liability was between the defendant and the plaintiff's employer, an express company, under which the former sought to defeat the plaintiff's action. This question was not passed upon; nor was it in the case of Dowd v. N. Y., Ont. & W. Ry. Co., 170 N. Y. 459, 63 N. E. 541, which involved the proposition of the implied assumption by the employé of the risks incident to the employment. The question of the validity of such a contract between an employer and a person in his employment, as affected by reasons of public policy, it must be conceded, is a debatable one. In support of the right to make the agreement we have respectable authority in decisions of the courts of England and of the State of Georgia. Griffiths v. Earl of Dudley, L. R. 9 Q. B. Div. 357; Western, etc., R. R. Co. v. Bishop, 50 Ga. 465; Same v. Strong, 52 Ga. 461. The great weight of authority in decisions of the courts of the various States, however, sustains the view that such an agreement is contrary to public policy. Railway Co. v. Spangler, 44 Ohio St. 471, 8 N. E. 467, 58 Am. Rep. 833; Railroad Co. v. Peavey, 29 Kan. 169, 44 Am. Rep. 630; Railroad Co. v. Jones, 2 Head (Tenn.) 517; Willis v. Railroad Co., 62 Me. 488; Railway Co. v. Eubanks, 48 Ark. 466, 3 S. W. 808, 3 Am. St. Rep. 245; Railroad Co. v. Jones, 92 Ala. 218, 9 South. 276; Maney v. Railroad Co., 49 Ill. App. 105; M. N., etc., Co. v. Eifert, 15 Ky. Law Rep. 575; Blanton v. Dold, 109 Mo. 64, 18 S. W. 1149; Johnson's Adm'x v. Railroad Co., 86 Va. 975, 11 S. E. 829. In the Supreme Court of this State we find, in addition to what has been

held below in this case, a similar view taken by the General Term of the Second Department in Simpson v. N. Y. Rubber Co., 80 Hun, 415, 30 N. Y. Supp. 339.

The preponderance of authority adverse to the validity of such contracts is such as greatly and properly influences our view of the question. In Griffiths v. Earl of Dudley, *supra,* where such an agreement was held to be quite consistent with public policy, the view of the English court, as expressed by Justice Field, was that "the interest of the employed only would be affected," and not that of "all society," and "that workmen, as a rule, were perfectly competent to make reasonable bargains for themselves." It is to be observed, however, with respect to the situation in England, that subsequently, in 1897, an act of Parliament was passed, entitled the "Workingmen's Compensation Act" which in effect declares the public policy of the State. By that act, in reality, though not in form, the right of the workingman to contract away his right to recover compensation from his employer is nullified, inasmuch as such a contract is only valid when, as between employer and employed, there exists a general scheme for compensation which secures to the workingman benefits as great as those he would derive from a proceeding under the compensation acts.

The attitude of this court, with respect to the freedom to contract for immunity from the consequences of negligence has been from an early day very firm where the contracts of common carriers are concerned, as may be seen by reference to Kenney v. N. Y. C. & H. R. R. R. Co., *supra,* where the cases establishing the rule were reviewed; but to extend the application of the doctrine in such cases to the relations of the employer and the employed involves considerations so closely touching the general welfare of the community that the State must be necessarily deeply concerned. This court has not been in agreement with the Supreme Court of the United States upon the right of common carriers to contract against their negligence; but recently, in Baltimore & Ohio So. Ry. Co. v. Voight, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560, the doctrine of New York Central R. R. Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627, seems to have been somewhat departed from. As that decision touches in a degree upon the question we are considering, I shall briefly refer to it. In that case Voight was an express messenger, and was injured as the consequence of a collision upon the railroad. The company showed, in defense of a claim for compensation, a contract made between it and the express company, relating to the latter's business, which agreed to protect it from liability to messengers by reason of accidents occurring through negligence, and a further contract between Voight and the express company, by which he assumed the risk of all accidents from negligence, sustained by him in the course of his employ-

ment, and agreed to hold his employer harmless from any claim for personal injuries. It was held that the contract did not contravene public policy. Though the distinction was made that Voight was not a passenger, within the meaning of the Lockwood Case, *supra,* and that his contract exonerated the railroad company from liability to him, it might, perhaps, be said that the decision affords some support, in doctrine, to the appellant's argument.

Contracts are illegal at common law, as being against public policy, when they are such as to injuriously affect or subvert the public interests. 1 Story, Eq. Juris. § 260n; Chesterfield v. Janssen, 2 Vesey, Sr. 125, 156. If it were true that the interest of the employed only would be affected by such contracts as the present one, as it was held by the English court, in Griffiths v. Earl of Dudley, *supra,* it would be difficult to defend, upon sound reasoning, the denial of the right to enter into them; but that is not quite true. The theory of their invalidity is in the importance to the State that there shall be no relaxation of the rule of law which imposes the duty of care on the part of the employer towards the employed. The State is interested in the conservation of the lives and of the healthful vigor of its citizens, and if employers could contract away their responsibility at common law, it would tend to encourage on their part laxity of conduct in, if not an indifference to, the maintenance of proper and reasonable safeguards to human life and limb. The rule of responsibility at common law is as just as it is strict, and the interest of the State in its maintenance must be assumed; for its policy has, in recent years, been evidenced in the progressive enactment of many laws which regulate the employment of children and the hours of work, and impose strict conditions with reference to the safety and healthfulness of the surroundings of the employed in the factory and in the shop. The employer and the employed, in theory, deal upon equal terms; but practically that is not always the case. The artisan or workman may be driven by need, or he may be ignorant, or of improvident character. It is therefore for the interest of the community that there should be no encouragement for any relaxation on the employer's part in his duty of reasonable care for the safety of his employé. That freedom of contract may be said to be affected by the denial of the right to make such agreements is met by the answer that the restriction is but a salutary one, which organized society exacts for the surer protection of its members. While it is true that the individual may be the one who directly is interested in the making of such a contract, indirectly the State, being concerned for the welfare of all its members, is interested in the maintenance of the rule of liability and in its enforcement by the courts.

To a certain extent, the internal activities of organized society are subject to the restraining action of the State. This is evidenced by

the many laws upon the statute book, in recent years, which have been passed for the purpose of prohibiting, restricting, or regulating the conduct of a private business, either because regarded as hurtful to the health or welfare of the community, or because deemed from its nature or magnitude affected with a public interest. It has been observed that it is still the business of the State, in modern times, to defend individuals against one another, and, though the proposition is a broad one, when considered with reference to penal legislation, and all legislation intended for the promotion of the health, welfare, and safety of the community, it is not without truth. It is evident, from the course of legislation framed for the purpose of affording greater protection to the class of the employed, that the people of this State have compelled the employer to do many things which at common law he was not under obligation to do. Such legislation may be regarded as supplementing the common-law rule of the employer's responsibility and is illustrative of the policy of the State. Therefore it is, when an agreement is sought to be enforced which suspends the operation of the common-law rule of liability and defeats the spirit of existing laws of the State, because tending to destroy the motive of the employer to be vigilant in the performance of his duty towards his employés, that it is the duty of the court to declare it to be invalid and to refuse its enforcement.

I think that the judgment below was correct, and should be affirmed, with costs.

26 Cyc. 1094–1096 (9–13); 26 H. L. R. 742.

Agreements which injure the State in its relations with other States.

GRAVES *v.* JOHNSON.

156 MASSACHUSETTS, 211.—1892.

[Reported herein at p. 435.]

Agreements which tend to injure the public service.

TRIST *v.* CHILD.

21 WALLACE (U. S.), 441.—1874.

Bill to enjoin defendant from withdrawing the sum of $14,559 from the United States Treasury, and for a decree commanding him to pay complainant $5000, and for general relief. Defense, illegality. Decree for complainant. Defendant appeals.

Defendant, having a claim against the United States for services, made an agreement with complainant's father (to whose rights as

partner and personal representative complainant succeeded) that he should take charge of the claim and prosecute it before Congress, and receive as compensation 25 per cent of whatever sum Congress might appropriate. The father, and after his death, the complainant, prosecuted the claim with the result that Congress appropriated the sum of $14,559 to pay it. Defendant refused to pay the 25 per cent stipulated and complainant filed this bill in the Supreme Court of the District of Columbia. From the evidence it appeared that personal solicitations were used to carry the bill, but there was no evidence that bribes were offered or contemplated.

Mr. Justice Swayne. The court below decreed to the appellee the amount of his claim, and enjoined Trist from receiving from the treasury "any of the money appropriated to him" by Congress, until he should have paid the demand of the appellee.

This decree, as regards that portion of the fund not claimed by the appellee, is an anomaly. Why the claim should affect that part of the fund to which it had no relation, is not easy to be imagined. This feature of the decree was doubtless the result of oversight and inadvertence. The bill proceeds upon the grounds of the validity of the original contract, and a consequent lien in favor of the complainant upon the fund appropriated. We shall examine the latter ground first. Was there, in any view of the case, a lien?

It is well settled that an order to pay a debt out of a particular fund belonging to the debtor gives to the creditor a specific equitable lien upon the fund, and binds it in the hands of the drawee. Yeates v. Groves, 1 Vesey, Jr. 280; Lett v. Morris, 4 Simons, 607; Bradley v. Root, 5 Paige, 632; 2 Story's Equity, § 1047. A part of the particular fund may be assigned by an order, and the payee may enforce payment of the amount against the drawee. Field v. The Mayor, 2 Selden, 179. But a mere agreement to pay out of such fund is not sufficient. Something more is necessary. There must be an appropriation of the fund *pro tanto,* either by giving an order or by transferring it otherwise in such a manner that the holder is authorized to pay the amount directly to the creditor without the further intervention of the debtor. Wright v. Ellison, 1 Wallace, 16; Hoyt v. Story, 3 Barbour's Supreme Court, 264; Malcolm v. Scott, 3 Hare, 39; Rogers v. Hosack, 18 Wendell, 319.

Viewing the subject in the light of these authorities, we are brought to the conclusion that the appellee had no lien upon the fund here in question. The understanding between the elder Child and Trist was a personal agreement. It could in nowise produce the effect insisted upon. For a breach of the agreement, the remedy was at law, not in equity, and the defendant had a constitutional right to a trial by jury. Wright v. Ellison, 1 Wallace, 16. If there was no lien, there was no jurisdiction in equity.

There is another consideration fatally adverse to the claim of a lien. The first section of the act of Congress of February 26, 1853, declares that all transfers of any part of any claim against the United States, "or of any interest therein, whether absolute or conditional, shall be absolutely null and void, unless executed in the presence of at least two attesting witnesses after the allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant therefor." That the claim set up in the bill to a specific part of the money appropriated is within this statute is too clear to admit of doubt. It would be a waste of time to discuss the subject.

But there is an objection of still greater gravity to the appellee's case.

Was the contract a valid one? It was, on the part of Child, to procure by lobby service, if possible, the passage of a bill providing for the payment of the claim. The aid asked by the younger Child of Trist, which indicated what he considered needful, and doubtless proposed to do and did do himself, is thus vividly pictured in his letter to Trist of the 20th February, 1871. After giving the names of several members of Congress, from whom he had received favorable assurances, he proceeds: "Please write to your friends to write to any member of Congress. Every vote tells, and a simple request may secure a vote, he not caring anything about it. Set every man you know at work. Even if he knows a page, for a page often gets a vote."

In the Roman law it was declared that "a promise made to effect a base purpose, as to commit homicide or sacrilege, is not binding." Institutes of Justinian, lib. 3, tit. 19, par. 24. In our jurisprudence a contract may be illegal and void because it is contrary to a constitution or statute, or inconsistent with sound policy and good morals. Lord Mansfield said (Jones v. Randall, 1 Cowper, 39): "Many contracts which are not against morality, are still void as being against the maxims of sound policy."

It is a rule of the common law of universal application, that where a contract express or implied is tainted with either of the vices last named, as to the consideration or the thing to be done, no alleged right founded upon it can be enforced in a court of justice.

Before considering the contract here in question, it may be well, by way of illustration, to advert to some of the cases presenting the subject in other phases, in which the principle has been adversely applied.

Within the condemned category are:

An agreement—to pay for supporting for election a candidate for sheriff, Swayze v. Hull, 3 Halsted, 54; to pay for resigning a public position to make room for another, Eddy v. Capron, 4 Rhode Island, 395; Parsons v. Thompson, 1 H. Blackstone, 322; to pay for not

bidding at a sheriff's sale of real property, Jones v. Caswell, 3 Johnson's Cases, 29; to pay for not bidding for articles to be sold by the government at auction, Doolin v. Ward, 6 Johnson, 194; to pay for not bidding for a contract to carry the mail on a specified route, Gulick v. Bailey, 5 Halsted, 87; to pay a person for his aid and influence in procuring an office, and for not being a candidate himself, Gray v. Hook, 4 Comstock, 449; to pay for procuring a contract from the government, Tool Company v. Norris, 2 Wallace, 45; to pay for procuring signatures to a petition to the governor for a pardon, Hatzfield v. Gulden, 7 Watts, 152; to sell land to a particular person when the surrogate's order to sell should have been obtained, Overseers of Bridgewater v. Overseers of Brookfield, 3 Cowen, 299; to pay for suppressing evidence and compounding a felony, Collins v. Blantern, 2 Wilson, 347; to convey and assign a part of what should come from an ancestor by descent, devise, or distribution, Boynton v. Hubbard, 7 Massachusetts, 112; to pay for promoting a marriage, Scribblehill v. Brett, 4 Brown's Parliamentary Cases, 144; Arundel v. Trevillian, 1 Chancery Reports, 87; to influence the disposition of property by will in a particular way, Debenham v. Ox, 1 Vesey, Sr. 276; see also Addison on Contracts, 91; 1 Story's Equity, ch. 7; Collins v. Blantern, 1 Smith's Leading Cases, 676, American note.

The question now before us has been decided in four American cases. They were all ably considered, and in all of them the contract was held to be against public policy, and void. Clippinger v. Hepbaugh, 5 Watts & Sergeant, 315; Harris v. Roof's Executor, 10 Barbour's Supreme Court, 489; Rose & Hawley v. Truax, 21 Id. 361; Marshall v. Baltimore and Ohio Railroad Company, 16 Howard, 314. We entertain no doubt that in such cases, as under all other circumstances, an agreement express or implied for purely professional services is valid. Within this category are included, drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them, orally or in writing, to a committee or other proper authority, and other services of like character. All these things are intended to reach only the reason of those sought to be influenced. They rest on the same principle of ethics as professional services rendered in a court of justice, and are no more exceptionable. But such services are separated by a broad line of demarcation from personal solicitation, and the other means and appliances which the correspondence shows were resorted to in this case. There is no reason to believe that they involved anything corrupt or different from what is usually practiced by all paid lobbyists in the prosecution of their business.

The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is under-

mined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the voice of universal history. 1 Montesquieu, Spirit of Laws, 17. The theory of our government is, that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice, and the public good. They are never to descend to a lower plane. But there is a correlative duty resting upon the citizen. In his intercourse with those in authority, whether executive or legislative, touching the performance of their functions, he is bound to exhibit truth, frankness, and integrity. Any departure from the line of rectitude in such cases is not only bad in morals, but involves a public wrong. No people can have any higher public interest, except the preservation of their liberties, than integrity in the administration of their government in all its departments.

The agreement in the present case was for the sale of the influence and exertions of the lobby agent to bring about the passage of a law for the payment of a private claim, without reference to its merits, by means which, if not corrupt, were illegitimate, and considered in connection with the pecuniary interest of the agent at stake, contrary to the plainest principles of public policy. No one has a right, in such circumstances, to put himself in a position of temptation to do what is regarded as so pernicious in its character. The law forbids the inchoate step, and puts the seal of its reprobation upon the undertaking.

If any of the great corporations of the country were to hire adventurers who make market of themselves in this way, to procure the passage of a general law with a view to the promotion of their private interests, the moral sense of every right-minded man would instinctively denounce the employer and employed as steeped in corruption, and the employment as infamous.

If the instances were numerous, open, and tolerated, they would be regarded as measuring the decay of the public morals and the degeneracy of the times. No prophetic spirit would be needed to foretell the consequences near at hand. The same thing in lesser legislation, if not so prolific of alarming evils, is not less vicious in itself, nor less to be condemned. The vital principle of both is the same. The evils of the latter are of sufficient magnitude to invite the most serious consideration. The prohibition of the law rests upon a solid foundation. A private bill is apt to attract little attention. It involves no great public interest, and usually fails to excite much discussion. Not unfrequently the facts are whispered to those whose duty it is to investigate, vouched for by them, and the passage of the measure is thus secured. If the agent is truthful, and conceals nothing, all is well. If he uses nefarious means with success, the spring-head and the stream of legislation are polluted. To legalize

the traffic of such service, would open a door at which fraud and falsehood would not fail to enter and make themselves felt at every accessible point. It would invite their presence and offer them a premium. If the tempted agent be corrupt himself, and disposed to corrupt others, the transition requires but a single step. He has the means in his hands, with every facility and a strong incentive to use them. The widespread suspicion which prevails, and charges openly made and hardly denied, lead to the conclusion that such events are not of rare occurrence. Where the avarice of the agent is inflamed by the hope of a reward contingent upon success, and to be graduated by a percentage upon the amount appropriated, the danger of tampering in its worst form is greatly increased.

It is by reason of these things that the law is as it is upon the subject. It will not allow either party to be led into temptation where the thing to be guarded against is so deleterious to private morals and so injurious to the public welfare. In expressing these views, we follow the lead of reason and authority.

We are aware of no case in English or American jurisprudence like the one here under consideration, where the agreement has not been adjudged to be illegal and void.

We have said that for professional services in this connection a just compensation may be recovered. But where they are blended and confused with those which are forbidden, the whole is a unit and indivisible. That which is bad destroys that which is good, and they perish together. Services of the latter character, gratuitously rendered, are not unlawful. The absence of motive to wrong is the foundation of the sanction. The tendency to mischief, if not wanting, is greatly lessened. The taint lies in the stipulation for pay. Where that exists, it affects fatally, in all its parts, the entire body of the contract. In all such cases, *potior conditio defendentis.* Where there is turpitude, the law will help neither party.

The elder agent in this case is represented to have been a lawyer of ability and high character. The appellee is said to be equally worthy. This can make no difference as to the legal principles we have considered, nor in their application to the case in hand. The law is no respecter of persons.

Decree reversed, and the case remanded, with directions to Dismiss the bill.[1]

9 Cyc. 486–489 (56–63); 30 L. R. A. 737; W. P. 435 (93); 436 (i).

1 "There is no real difference in principle between agreements to procure favors from legislative bodies and agreements to procure favors in the shape of contracts from the heads of departments. The introduction of improper elements to control the action of both, is the direct and inevitable result of all such arrangements."—Mr. Justice Field, in Tool Co. v. Norris, 2 Wall. (U. S.) 45, 55. Followed in Meguire v. Corwine, 101 U. S.

SOUTHARD *v.* BOYD.

51 NEW YORK, 177.—1872.

Action to recover commissions earned by plaintiffs as ship brokers in chartering defendant's vessel to the government. Judgment for plaintiffs reversed at General Term. Plaintiffs appeal.

EARL, C. . . . The further claim is made that the contract with the plaintiffs was for an illegal service, in that they charged a commission for claiming to have influence with a government agent to accept a vessel already offered, but not yet accepted.

It is true that one of the plaintiffs was a son, and that another was a son-in-law of one of the government agents, whose business it was to select the vessels for the government, and the plaintiffs probably had facilities for chartering vessels which others did not have. But the plaintiffs did not contract to do an illegal service. They did not agree to use any corrupt means to procure the charter. The fact that the plaintiffs had intimate relations with the government agents, and could probably therefore influence their action much more readily than others, did not forbid their employment. Lyon v. Mitchell, 36 N. Y. 235.

I am unable to see, therefore, upon what ground the contract of the defendant with the plaintiffs can be considered as illegal.

The order of the General Term should be reversed and judgment upon the verdict affirmed, with costs. All concur.

Order reversed and judgment accordingly.[1]

9 Cyc. 490 (68-69); W. P. 435 (93).

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108 (contract for appointment to public office); Oscanyan v. Arms Co., 103 U. S. 261 (contract of resident consul to influence purchasing agent of home government). See criticism on the case in Lyon v. Mitchell, 36 N. Y. 235. As to agreements for influencing corporate or other fiduciary action, see Woodstock Iron Co. v. Richmond &c. Co., 129 U. S. 643. As to the assignment of unearned salaries of public officers, see Bowery Nat. Bank v. Wilson, 122 N. Y. 478.

[1] As to whether in New York, the test of illegality in lobbying contracts is that improper acts were contemplated, or on the other hand, that the contract merely *tends* to improper acts, see Dunham v. Co., 118 Appellate Division, 127 (affirmed, without opinion, 189 N. Y. 500).

Agreements which tend to pervert the course of justice.

(1.) *Stifling criminal proceedings.*

PARTRIDGE *v.* HOOD.

120 MASSACHUSETTS, 403.—1876.

Contract. The answer averred that the consideration of the contract was an agreement on the part of the plaintiff to stop a criminal prosecution against Edward K. Hood, the defendant's son. The court ruled that the agreement was illegal and directed judgment for defendant. Plaintiff alleged exceptions.

GRAY, C. J. The reason that a private agreement, made in consideration of the suppression of a prosecution for crime, is illegal, is that it tends to benefit an individual at the expense of defeating the course of public justice. The doctrine has never been doubted as applied to felonies, and the English authorities before our Revolution extended it to all crimes. 2 West Symb. Compromise & Arbitrament, § 33; Horton v. Benson, 1 Freem. 204; Bac. Ab. Arbitrament & Award, A; Johnson v. Ogilby, 3 P. Wms. 277, and especially the register's book cited by Mr. Cox in a note to page 279; Collins v. Blantern, 2 Wils. 341; 4 Bl. Com. 363, 364. An appeal of mayhem could be barred by arbitrament, or accord and satisfaction, or release of all personal actions, because it was the suit of the appellant and not of the Crown, and subjected the appellee to damages only, like an action of trespass. Blake's Case, 6 Rep. 43 b, 44 c; 2 Hawk. c. 23, §§ 24, 25.

Some confusion was introduced into the English law upon this subject by the rulings of Lord Kenyon: Kyd on Awards (Am. ed.), 64–68; Drage v. Ibberson, 2 Esp. 643; Fallowes v. Taylor, Peake Ad. Cas. 155; S. C. 7 T. R. 475; and by Mr. Justice Le Blanc's suggestion of a distinction between a prosecution for public misdemeanor and one for a private injury to the prosecutor. Edgcombe v. Rodd, 5 East, 294, 303; S. C. 1 Smith, 515, 520. This confusion was not wholly removed by the opinions of Lord Ellenborough in Edgcombe v. Rodd, 5 East, 294, 302; in Wallace v. Hardacre, 1 Camp. 45, 46; in Pool v. Bousfield, 1 Camp. 55, and in Beeley v. Wingfield, 11 East, 46, 48; of Chief Justice Gibbs in Baker v. Townshend, 1 Moore, 120, 124; S. C. 7 Taunt. 422, 426; or of Lord Denman in Keir v. Leeman, 6 Q. B. 308, 321.

But in the very able judgment of the Exchequer Chamber in Keir v. Leeman (9 Q. B. 371, 395), Chief Justice Tindal, after reviewing the previous cases, summed up the matter thus:

"Indeed it is very remarkable what very little authority there is to be found, rather consisting of *dicta* than decisions, for the principle that

any compromise of a misdemeanor, or indeed of any public offense, can be otherwise than illegal, and any promise founded on such a consideration otherwise than void. If the matter were *res integra*, we should have no doubt on this point. We have no doubt that, in all offenses which involve damages to an injured party for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit. It is said, indeed, that in the case of an assault he may also undertake not to prosecute on behalf of the public. It may be so, but we are not disposed to extend this any further."

In Fisher v. Apollinaris Co. (L. R. 10 Ch. 297) the plaintiff, pursuant to an agreement of the defendants to abandon a prosecution against him under St. 25 & 26 Vict. c. 88, for a violation of their trade-mark, gave them a letter of apology, with authority to make use of it as they might think necessary, and, after they had published it by advertisement for two months, filed a bill in equity to restrain them from continuing the publication, which was dismissed by the lords justices. The principal grounds of the decision appear to have been that the defendants had done nothing that the plaintiff had not authorized them to do; and that, even if the publication affected the plaintiff's reputation, a court of chancery had no jurisdiction to restrain it. See Prudential Assurance Co. v. Knott, L. R. 10 Ch. 142; Boston Diatite Co. v. Florence Manufacturing Co., 114 Mass. 69. It was indeed observed that "it was no more a violation of the law to accept an apology in such a case than it would be to compromise an indictment for a nuisance or for not repairing a highway on the terms of the defendants agreeing to remove the nuisance or repair the highway." L. R. 10 Ch. 302. But this observation was not necessary to the decision; and in the Queen v. Blakemore (14 Q. B. 544) an agreement for the compromise of an indictment for not repairing a highway was held illegal and void. All the other recent English authorities support the judgment of Chief Justice Tindal, above quoted. The Queen v. Hardey, 14 Q. B. 529, 541; Clubb v. Hutson, 18 C. B. (N. S.) 414; Williams v. Bayley, L. R. 1 H. L. 200, 213, 320.

In Jones v. Rice (18 Pick. 440, 442), Mr. Justice Putnam delivering the opinion of this court, after alluding to the English cases in the time of Lord Kenyon, relied on to "sustain the distinction between considerations arising from the compounding of felonies, which is admitted to be illegal, and the compounding of misdemeanors, which is alleged to be lawful," said:

"We do not think that such a power is vested in individuals. It would enable them to use the claim of the government for their own emolument, and greatly to the oppression of the people. It has a direct tendency to obstruct the course of the administration of justice; and the mischief extends, we think, as well to misdemeanors as to felonies. The power to stop prosecutions is vested in the law officers of the Commonwealth, who use it with prudence and discretion. If it were given to the party in-

jured, who might be the only witness who could prove the offense, he might extort for his own use money which properly should be levied as a fine upon the criminal party for the use of the Commonwealth."

It is true that the prosecution in Jones v. Rice was for a riot as well as for an assault. But the language and the reasoning of the opinion extend to the compounding of any offense whatever. Any act which is made punishable by law as a crime is an offense against the public, and, especially in this country, where all prosecutions are subject to the control of official prosecutors, and not of the individuals immediately injured, cannot lawfully be made the subject of private compromise, except so far as expressly authorized by statute. And this view is supported by the great weight of American authority. Hinds v. Chamberlin, 6 N. H. 225; Shaw v. Spooner, 9 N. H. 197; Shaw v. Reed, 30 Maine, 105; Bowen v. Buck, 28 Vt. 308; People v. Bishop, 5 Wend. 111; Noble v. Peebles, 13 S. & R. 319, 322; Maurer v. Mitchell, 9 W. & S. 69, 71; Cameron v. M'Farland, 2 Car. Law Rep. 415; Corley v. Williams, 1 Bailey, 588; Vincent v. Groom, 1 Yerger, 430; Met. Con. 226, 227; 1 Story Eq. Jur. § 294.

The legislature of the commonwealth has defined the cases and circumstances in which the compromise of a prosecution shall be allowed. By a provision first introduced in the Revised Statutes, when a person is committed or indicted for an assault and battery or other misdemeanor for which the party injured may have a remedy by civil action (except when committed by or upon an officer of justice, or riotously, or with intent to commit a felony), if the party injured appears before the magistrate or court and acknowledges satisfaction for the injury sustained, a stay of proceedings may be ordered. Rev. Sts. c. 135, § 25; c. 136, § 27; Gen Sts. c. 170, § 33; c. 171, § 28. Such an acknowledgment of satisfaction does not entitle the defendant to be discharged, but leaves it to the discretion of the magistrate or court whether a stay of proceedings is consistent with the interests of public justice. Commonwealth v. Dowdican's Bail, 115 Mass. 133. See also State v. Hunter, 14 La. Ann. 71.

In the case at bar, it being found as a fact that the agreement sued on was entered into by the defendant for the purpose of compounding a complaint against her son for a misdemeanor, and it not appearing that satisfaction has ever been acknowledged in or approved by the court in which the prosecution was pending, judgment was rightly ordered for the defendant.

Exceptions overruled.[1]

9 Cyc. 505 (37); 508-510 (51-67); W. P. 442 (2).

[1] In Nickelson v. Wilson, 60 N. Y. 362, the court said: "An agreement to cripple, stifle, or embarrass a prosecution for a criminal offence, by destroying or withholding evidence, suppressing facts, or other acts of that

(2.) *Agreements to arbitrate.*

HAMILTON *v.* LIVERPOOL &c. INS. CO.

136 UNITED STATES, 242.—1889.

Action on an insurance policy containing this stipulation:

"It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery, until after an award shall have been obtained fixing the amount of such claim in the manner above provided."

The manner provided for fixing the amount of loss in case of dispute was by reference to arbitrators selected by the parties. The court directed a verdict for the defendant. Plaintiff brings error.

Mr. Justice Gray. The conditions of the policy in suit clearly and unequivocally manifest the intention and agreement of the parties to the contract of insurance that any difference arising between them as to the amount of loss or damage of the property insured shall be submitted, at the request in writing of either party, to the appraisal of competent and impartial persons, to be chosen as therein provided, whose award shall be conclusive as to the amount of such loss or damage only, and shall not determine the question of the liability of the company; that the company shall have the right to take the whole or any part of the property at its appraised value so ascertained; and that until such appraisal shall have been permitted, and such an award obtained, the loss shall not be payable, and no action shall lie against the company. The appraisal, when requested in writing by either party, is distinctly made a condition precedent to the payment of any loss, and to the maintenance of any action.

Such a stipulation, not ousting the jurisdiction of the courts, but leaving the general question of liability to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is unquestionably valid, according to the uniform current of authority in England and in this country. Scott v. Avery, 5 H. L. Cas. 811; Viney v. Bignold, 20 Q. B. D. 172; Delaware & Hudson Canal v. Pennsylvania Coal Co., 50 N. Y. 250; Reed v. Washington Ins. Co., 138 Mass. 572, 576; Wolff v. Liverpool

character, is against public policy and void. In such cases the parties take the responsibility of interfering with, and by secret or indirect means, frustrating the administration of justice. But an agreement to lay the whole facts before the court, and to leave it to the free exercise of the discretionary powers vested in it by law, is not in itself wrong, and it is not rendered illegal even by a stipulation on the part of a prosecutor to exert such legitimate influence as his position gives him in favor of the extension of mercy to a guilty party."

& London & Globe Ins. Co., 21 Vroom, 453; Hall v. Norwalk Fire Ins. Co., 57 Conn. 105, 114. The case comes within the general rule long ago laid down by this court: "Where the parties, in their contract, fix on a certain mode by which the amount to be paid shall be ascertained, as in the present case, the party that seeks an enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect. He cannot compel the payment of the amount claimed, unless he shall procure the kind of evidence required by the contract, or show that by time or accident he is unable to do so." United States v. Robeson, 9 Pet. 319, 327. See also Martinsburg & Potomac Railroad v. March, 114 U. S. 549.

Upon the evidence in this case, the question whether the defendant had duly requested, and the plaintiff had unreasonably refused, to submit to such an appraisal and award as the policy called for, did not depend in any degree (as in Uhrig v. Williamsburg Ins. Co., 101 N. Y. 362, cited for the plaintiff) on oral testimony or extrinsic facts, but wholly upon the construction of the correspondence in writing between the parties, presenting a pure question of law, to be decided by the court. Turner v. Yates, 16 How. 14, 23; Bliven v. New England Screw Co., 23 How. 420, 433; Smith v. Faulkner, 12 Gray, 251.

That correspondence clearly shows that the defendant explicitly and repeatedly in writing requested that the amount of the loss or damage should be submitted to appraisers in accordance with the terms of the policy; and that the plaintiff as often peremptorily refused to do this, unless the defendant would consent, in advance, to define the legal powers and duties of the appraisers (which the defendant was under no obligation to do), and that the plaintiff throughout, against the constant protest of the defendant, asserted, and at last exercised, a right to sell the property before the completion of an award according to the policy, thereby depriving the defendant of the right, reserved to it by the policy, of taking the property at its appraised value, when ascertained in accordance with the conditions of the policy.

The court therefore rightly instructed the jury that the defendant had requested in writing, and the plaintiff had declined, the appraisal provided for in the policy, and that the plaintiff, therefore, could not maintain this action.

If the plaintiff had joined in the appointment of appraisers, and they had acted unlawfully, or had not acted at all, a different question would have been presented. Judgment affirmed.[1]

9 Cyc. 512–514 (77–82); W. P. 448 (44); Burnham, Arbitration as a condition precedent, 11 H. L. R. 234.

[1] In Hamilton v. Home Ins. Co. (137 U. S. 370), the provisions were (1) for an appraisal by disinterested parties, and (2) in case of differences

ALLEN, J., IN DELAWARE & HUDSON CANAL CO., *v.* PENNSYLVANIA COAL CO.

50 NEW YORK, 250.—1872.

It appears to be well settled by authority that an agreement to refer all matters of difference or dispute that may arise to arbitration, will not oust a court of law or equity of jurisdiction. The reason of the rule is by some traced to the jealousy of the courts, and a desire to repress all attempts to encroach on the exclusiveness of their jurisdiction; and by others to an aversion of the courts, from reasons of public policy, to sanction contracts by which the protection which the law affords the individual citizens is renounced. An agreement of this character induced by fraud, or overreaching, or entered into

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as to loss after proof, the submission of the dispute to arbitrators "whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the company under this policy." In the opinion by Mr. Justice Gray, it is said: "A provision in a contract for the payment of money upon a contingency, that the amount to be paid shall be submitted to arbitrators, whose award shall be final as to that amount, but shall not determine the general question of liability, is undoubtedly valid. If the contract further provides that no action upon it shall be maintained until after such award, then, as adjudged in Hamilton v. Liverpool, London & Globe Ins. Co., above cited, and in many cases therein referred to, the award is a condition precedent to the right of action. But when no such condition is expressed in the contract, or necessarily to be implied from its terms, it is equally well settled that the agreement for submitting the amount to arbitration is collateral and independent, and that a breach of this agreement, while it will support a separate action, cannot be pleaded in bar to an action on the principal contract. Roper v. Lendon, 1 El. & El. 825; Collins v. Locke, 4 App. Cas. 674; Dawson v. Fitzgerald, 1 Ex. D. 257; Reed v. Washington Ins. Co., 138 Mass. 572; Seward v. Rochester, 109 N. Y. 164; Birmingham Ins. Co. v. Pulver, 126 Ill. 329, 338; Crossley v. Connecticut Ins. Co., 27 Fed. Rep. 30. The rule of law upon the subject was well stated in Dawson v. Fitzgerald by Sir George Jessel, Master of the Rolls, who said: 'There are two cases where such a plea as the present is successful: first, where the action can only be brought for the sum named by the arbitrators; secondly, where it is agreed that no action shall be brought till there has been an arbitration, or that arbitration shall be a condition precedent to the right of action. In all other cases where there is, first, a covenant to pay, and secondly, a covenant to refer, the covenants are distinct and collateral, and the plaintiff may sue on the first, leaving the defendant' 'to bring an action for not referring,' or (under a modern English statute) 'to stay the action till there has been an arbitration.' 1 Ex. D. 260."

Mutual benefit insurance.—It has been held that an arbitration provision, covering all matters in dispute, in a mutual benefit society policy is binding and enforceable. Rood v. Railway &c. Ass'n, 31 Fed. R. 62; Van Poucke v. Society, 63 Mich. 378; Robinson v. Templar Lodge, 117 Cal. 370. And this doctrine was extended to mutual fire insurance companies in Raymond v. Farmers' Mut. Fire Ins. Co., 114 Mich. 386.

unadvisedly through ignorance, folly or undue pressure, might well be refused a specific performance, or disregarded when set up as a defence to an action.

But when the parties stand upon an equal footing, and intelligently and deliberately, in making their executory contracts, provide for an amicable adjustment of any difference that may arise, either by arbitration or otherwise, it is not easy to assign at this day any good reason why the contract should not stand, and the parties made to abide by it, and the judgment of the tribunal of their choice. Were the question *res nova,* I apprehend that a party would not now be permitted, in the absence of fraud or some peculiar circumstances entitling him to relief, to repudiate his agreement to submit to arbitration, and seek a remedy at law, when his adversary had not refused to arbitrate, or in any way obstructed or hindered the arbitration agreed upon. But the rule that a general covenant to submit any differences that may arise in the performance of a contract, or under an executory agreement, is a nullity, is too well established to be now questioned; and the decision of the appeal of the present defendant does not make it necessary to inquire into the reasons of the rule, or question its existence. The better way, doubtless, is to give effect to contracts, when lawful in themselves, according to their terms and the intent of the parties; and any departure from this principle is an anomaly in the law, not to be extended or applied to new cases unless they come within the letter and spirit of the decisions already made. The tendency of the more recent decisions is to narrow rather than enlarge the operation and effect of prior decisions, limiting the power of contracting parties to provide a tribunal for the adjustment of possible differences, without a resort to courts of law; and the rule is essentially modified and qualified. . . . The distinction between the two classes of cases is marked and well defined. In one class the parties undertake by an independent covenant or agreement to provide for an adjustment and settlement of all disputes and differences by arbitration, to the exclusion of the courts, and in the other they merely, by the same agreement which creates the liability and gives the right, qualify the right by providing that before a right of action shall accrue certain facts shall be determined or amounts and values ascertained, and this is made a condition precedent either in terms or by necessary implication.

This case is within the latter class, and the condition being lawful, the courts have never hesitated to give full effect to it.[1]

9 Cyc. 512 (77); 513 (78, 81); W. P. 448 (15).

[1] Into which of the two classes a doubtful clause fell, was the subject of discussion in National Contracting Co. v. Hudson River Co., 170 N. Y. 439.

MILES *v.* SCHMIDT.

168 MASSACHUSETTS, 339.—1897.

Bill in equity, to enforce the specific performance of a written contract.

The defendant demurred to the bill, assigning as ground therefor the following arbitration clause contained in the contract:

"It is further mutually agreed that in case of any alleged violation of the promises and agreements herein made by said Schmidt or by said firm, if such alleged violation is continued after thirty days' notice in writing from the other to the party charged as guilty of such violation, requiring such party to cease such violation, then the party so guilty shall be liable to the other for all damages caused by such violation, to be determined by a board of referees in manner as follows:

"After the expiration of the thirty days' notice provided for in the above clause, said Schmidt and said firm shall each forthwith appoint a referee, and the two so appointed shall appoint the third. If either party fails to appoint a referee for ten days, after written notice of such appointment by the other party, then the referee so appointed shall appoint a second, and the two so appointed shall appoint a third.

"The referees shall proceed forthwith to hear the parties and to determine whether or not there has been any violation of the agreements herein contained, and whether the same has continued for more than thirty days after notice to discontinue such violation above provided for, and what damage either party has sustained by reason of such violation.

"The decision of a majority of said referees shall be final and binding on said parties, and they hereby agree to abide by, submit to, and forthwith to comply with any decision, or award, of a majority of said referees. The expense of any such reference shall be borne by any or all of the parties in such proportion as said referees may determine."

The Superior Court sustained the demurrer and dismissed the bill, and the plaintiff appealed to this court.

MORTON, J. Perhaps, if the question were a new one, no objection would be found to permitting parties to select their own tribunals for the settlement of civil controversies, even though the result might be to oust the courts of jurisdiction in such cases. But the law is settled otherwise in this State. Rowe v. Williams, 97 Mass. 163; Wood v. Humphrey, 114 Mass. 185; Pearl v. Harris, 121 Mass. 390; Vass v. Wales, 129 Mass. 38; White v. Middlesex Railroad, 135 Mass. 216.

When the question is a preliminary one, or in aid of an action at law or suit in equity, such, for instance, as the ascertainment of dam-

ages, an agreement for arbitration will be upheld. Wood v. Humphrey, 114 Mass. 185; Reed v. Washington Ins. Co., 138 Mass. 572, 575; Hutchinson v. Liverpool & London & Globe Ins. Co., 153 Mass. 143. The defendant contends that the agreement for arbitration in this case goes no further than the assessment of damages. But it is expressly provided, amongst other things, that the referees shall "hear the parties and determine whether or not there has been any violation of the agreements herein contained, . . . and what damage either party has sustained" thereby, and that "the decision of a majority of said referees shall be final and binding on said parties." The evident intent is to submit all the disputes relating to the performance of the agreement to the final decision of a tribunal constituted by the parties themselves. The referees are not only to assess the damages, but also are to determine whether there have been any violations of the agreement, and their decision in all matters is to be final. The agreement to submit to arbitration was therefore in violation of law, and the demurrer should have been overruled.

Demurrer overruled, and decree dismissing bill set aside.

9 Cyc. 512 (77); W. P. 448 (15).

(3.) *Agreements determining jurisdiction.*

KNOWLTON, C. J., IN MITTENTHAL *v.* MASCAGNI.

183 MASSACHUSETTS, 19.—1903.

This case comes before us on a report from the superior court submitting the question whether there was an error of the presiding justice in overruling the motion to dismiss, the answer in abatement, and demurrer filed by the defendant, and in ruling that the fifteenth paragraph of the contract between the plaintiffs and defendant, upon certain facts agreed, was not a bar to the prosecution of the action in this commonwealth. The contract referred to was made in Florence, Italy, where the defendant, a subject of the King of Italy, had his home, and where the plaintiffs, citizens of the State of New York, elected a domicile by a provision of the contract. By it the defendant undertook to direct certain concerts, and direct and present certain operas, all composed by him, in the course of a tour through such parts of the United States and Canada as the plaintiffs should designate, covering a period of 15 weeks, for the sum of $4000 per week, with sundry provisions for expenses, and the like, and other stipulations prescribing the rights of the parties in various particulars, which it is unnecessary to state. The contract was in the Italian language, and, according to the translated copy annexed to the plaintiffs' writ, it contains the following

provisions: "The present contract in its form and substance is regulated by the Italian laws by will of the parties concerned, and according to article nine of the Italian Civil Code. Whatever difference or question there might arise between the parties, including the agent, will be acted upon by the civil authorities of Florence, Italy. Maestro Mascagni reserves the right of direct action in New York for the payment of his recompense, and therefore he alone has the faculty to derogate the competence of the established contract." The defendant moved to dismiss this suit, and answered in abatement, and demurred on the ground that, under this provision, our courts have no jurisdiction.

The determining question seems to be whether such a contract as this is so improvident and unreasonable—such an abnegation of legal rights—that the government, for the protection of mankind, will refuse to recognize it, even when made in a foreign country by subjects or citizens of that country. We can fancy the parties to this contract at the time of making it saying something like this: "As the performance of this contract will not only involve travel through one or more foreign countries in going to America and returning, but will involve journeying long distances through a great many independent States, each of which has its own courts and system of laws, under some of which a person sued in a civil action, when about to leave the State, may be arrested and held to bail or in imprisonment, if suits may be brought in any one of these numerous jurisdictions there is a liability to great trouble and expense on the part of the defendant in meeting the litigation. The contract contemplates a service of fifteen weeks, after which Maestro Mascagni intends to return to his permanent home, in Florence. It will be better and more reasonable for both of us to provide that our controversies, if any arise, shall be settled by the courts of Florence, than to leave both parties subject to suits in forty or fifty different jurisdictions, at great distances from the home of either." If, moved by such considerations, the parties made the agreement in question, shall the court say that they were *non compotes mentis,* and that their agreement was so improvident and unreasonable that it cannot be permitted to stand? The case is quite unlike Nute v. Hamilton Insurance Company, 6 Gray, 174, although it has some features in common with that. In that case the provision was contained in a by-law of a mutual insurance company, and it undertook to limit claimants to one county in a small State for the venue of actions. The principles laid down in Daley v. People's Building Association, 178 Mass. 13, 59 N. E. 452, are applicable, although the cases are different in some particulars. Similar doctrines are stated *in re* New York, Lackawanna & Western Railroad Company, 98 N. Y. 447, 452, and Greve v. Ætna Insurance Company, 81 Hun, 28, 30 N. Y. Supp. 668.

There is no attempt here to deprive either party of the right of appeal to the courts, as in Rowe v. Williams, 97 Mass. 163, but only an attempt to narrow the area within which suits may be brought. This is analogous to the limitation of the subjects of which the courts shall have exclusive jurisdiction, by a provision for the arbitration of incidental and subsidiary questions out of court, which is approved in the cases above cited. It is also analogous to the limitation by contract of the time within which suits may be brought. Eliot National Bank v. Beal, 141 Mass. 566, 6 N. E. 742. We are of opinion that this part of the contract is valid.[1]

9 Cyc. 511 (70); W. P. 446 (11); 16 H. L. R. 599.

Agreements which tend to abuse of legal process: champerty and maintenance.

ACKERT *v.* BARKER.

131 MASSACHUSETTS, 436.—1881.

Action against an attorney for money had and received, being the sums obtained by him on suits against two insurance companies. The answer set up "that the plaintiff agreed, in consideration of the defendant acting for him in the premises, that said defendant should, out of any and all moneys received by him from said insurance companies, retain one-half of the amount received after payment of proper costs and charges." The trial court charged that if the jury found that there was an agreement by which defendant was to retain one-half

[1] In Gitler v. Russian Co., 124 N. Y. Appellate Div. 273, one defense was that "in or about the month of November, 1902, and subsequent to the entry of the judgment referred to in the complaint herein, the plaintiffs for a valuable consideration agreed with this defendant herein that they, the said plaintiffs, would not bring any action in the State of New York against this defendant upon or in respect to the judgment referred to in the complaint herein, but that any such action should be brought, if at all, in Russia, and thereafter such an action was brought in Russia by an assignee of plaintiffs." The court said, "that a valid contract may be made to refrain from pursuing a particular remedy to enforce an existing claim, since public policy is in no way concerned with the option which every man has to sue or forbear to sue. (Perryman v. Allen, 50 Ala. 573.) The agreement in the present case goes no further than this. The cause of action to enforce the judgment was the plaintiffs'. They could do with it as they saw fit to the extent of releasing it wholly on the one hand, or of prosecuting every legal method for its collection on the other. Whatever course they saw fit to adopt was no matter of public concern, and affects no question of public policy, and if they saw fit to make an agreement, otherwise valid, that they would forbear to pursue their remedy by action in the courts of this State, there is no public policy which renders that agreement invalid." See 8 C. L. R. 409.

the sum collected as compensation for his services, such agreement was unlawful. Verdict for plaintiff. Defendant alleged exceptions.

GRAY, C. J. The defendant's answer and bill of exceptions, fairly construed, show that the agreement set up by the defendant was an agreement by which, in consideration that an attorney should prosecute suits in behalf of his client for certain sums of money, in which he had himself no previous interest, it was agreed that he should keep one-half of the amount recovered in case of success, and should receive nothing for his services in case of failure.

By the law of England from ancient times to the present day, such an agreement is unlawful and void, for champerty and maintenance, as contrary to public justice and professional duty, and tending to speculation and fraud, and cannot be upheld, either at common law or in equity. 2 Rol. Ab. 114; Lord Coke, 2 Inst. 208, 564. Hobart, C. J., Box v. Barnaby, Hob. 117 a; Lord Nottingham, Skapholme v. Hart, Finch, 477; S. C. 1 Eq. Cas. Ab. 86, pl. 1; Sir William Grant, M. R., Stevens v. Bagwell, 15 Ves. 139; Tindal, C. J., Stanley v. Jones, 7 Bing. 369, 377; S. C. 5 Moore & Payne, 193, 206; Coleridge, J., *In re* Masters, 1 Har. & Wol. 348; Shadwell, V. C., Strange v. Brennan, 15 Sim. 346; Lord Cottenham, S. C. on appeal, 2 Coop. Temp. Cottenham, 1; Erle, C. J., Grell v. Levy, 16 C. B. (N. S.) 73; Sir George Jessel, M. R., *In re* Attorneys & Solicitors Act, 1 Ch. D. 573.

It is equally illegal by the settled law of this Commonwealth. Thurston v. Percival, 1 Pick. 415; Lathrop v. Amherst Bank, 9 Met. 489; Swett v. Poor, 11 Mass. 549; Allen v. Hawks, 13 Pick. 79, 83; Call v. Calef, 13 Met. 362; Rindge v. Coleraine, 11 Gray, 157, 162; 1 Dane Ab. 296; 6 Dane Ab. 740, 741. In Lathrop v. Amherst Bank, the fact that the agreement did not require the attorney to carry on the suit at his own expense was adjudged to be immaterial. 9 Met. 492. In Scott v. Harmon (109 Mass. 237) and in Tapley v. Coffin (12 Gray, 420), cited for the defendant, the attorney had not agreed to look for his compensation to that alone which might be recovered, and thus to make his pay depend upon his success.

The law of Massachusetts being clear, there would be no propriety in referring to the conflicting decisions in other parts of the country. If it is thought desirable to subordinate the rules of professional conduct to mercantile usages, a change of our law in this regard must be sought from the legislature and not from the courts.

The defendant, by virtue of his employment by the plaintiff, and of his professional duty, was bound to prosecute the claims intrusted to him for collection, and holds the amount recovered as money had and received to the plaintiff's use. The agreement set up by the defendant, that he should keep one-half of that amount, being illegal and void, he is accountable to the plaintiff for the whole amount, deduct-

ing what the jury have allowed him for his costs. *In re* Masters, and Grell v. Levy, above cited; Pince v. Beattie, 32 L. J. (N. S.) Ch. 734.

Of Best v. Strong (2 Wend. 319), on which the defendant relies as showing that, assuming this agreement to be illegal, the plaintiff cannot maintain this action, it is enough to say that there the money was voluntarily paid to the defendant, with the plaintiff's assent, after the settlement of the suit by which it was recovered; and it is unnecessary to consider whether, upon the facts before the court, the case was well decided.

Exceptions overruled.[1]

6 Cyc. 858–860 (37–42); 12 L. R. A. (N. S.) 606; W. P. 451 (17).

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[1] "The grounds upon which contracts were held voidable for champerty or maintenance, as against the policy of the law, were that there might be combinations of powerful individuals to oppress others which might even influence or overawe the court, and that they tended to the promotion and enforcement of unfounded claims, to disturb the public repose, to promote litigation, and to breed strife and quarrels among neighbors. With the progress of society these reasons have everywhere lost much of their force, and the whole doctrine on this subject has been rejected in several States of the Union as antiquated and incongruous in the existing state of society, notably in New Jersey, Texas, California, and Mississippi. Without desiring to modify or in any way recede from the doctrine on this subject, as it has heretofore been held in Massachusetts, we see no reason for its further extension. Neither the definition of champerty nor the reasons why it was held to be an offense have any proper application to a proceeding such as that by which the defendant, under his contract with the plaintiff, sought to enforce his claim against the government of the United States. There was no suit to be brought, nor any defendant in the proposed proceeding, in the same sense that there is in a contested cause at law or in equity." —Devens, J., in Manning v. Sprague, 148 Mass. 18, 20.

Other tests.—Some jurisdictions adopt the test used in Phillips v. Commissioners, 119 Ills. 626, where the court said: "The contract provided that the litigation should be carried on, and Beckwith, Ayer, and Kales were to render the professional services and were to receive one-fourth of what should be realized for such services. If an agreement of this character, entered into between attorney and client, is champertous, then the point is well taken; but as we understand the law, the contract lacked one essential element to render it champertous, and that is, that the attorneys should prosecute the litigation at their own costs and expense. Had the contract provided that the attorneys should carry on the litigation for a share of what they might recover, at their own cost and expense, then the contract might have been champertous and void. Thompson v. Reynolds, 73 Ill. 11; Park Commissioners v. Coleman, 108 Id. 601. Such, however, is not the case. The written contract, which alone fixes and determines the rights and duties of the parties, contains no provision whatever requiring the attorneys or the park commissioners to pay the costs or expenses of the litigation." See 6 Cyc. 858–860 (38–42).

In New York, "It does not affect the validity of the contract between the attorney and his client, that measured by the old rules relating to champerty and maintenance, it would have fallen under their condemnation; for neither doctrine now prevails except so far as preserved by our statutes. . . . They

W. ALLEN, J., IN BLAISDELL *v.* AHERN.

144 MASSACHUSETTS, 393.—1887.

Ackert v. Barker, 131 Mass. 436, and Belding v. Smythe, 138 Mass. 530, are cases of champerty, where a part of the amount recovered was to be received in compensation for services, and there was to be no personal liability. Where the right to compensation is not confined to an interest in the thing recovered, but gives a right of action against the party, though pledging the avails of the suit, or a part of them, as security for payment, the agreement is not champertous. Tapley v. Coffin, 12 Gray, 420; Scott v. Harmon, 109 Mass. 237; McPherson v. Cox, 96 U. S. 404; Christie v. Sawyer, 44 N. H. 298; Anderson v. Radcliffe, E., B. & E. 806, 817. We do not see anything in the agreement which renders it void for maintenance. In a sense a lawyer may be said to maintain another in a suit when he gives his advice or services, as formerly it would have been maintenance for a layman to do so; but such acts have long since ceased to be unlawful,

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forbid, first, the purchase of obligations named, by an attorney, for the purpose and with the intent of bringing a suit thereon; and, second, any loan or advance, 'as an inducement to the placing, or in consideration of having placed in the hands of such attorney,' any demand for collection."—Fowler v. Callan, 102 N. Y., 395. Now § 274 of the Penal Law.

Extent of the effect.—In Small v. C. R. I. & P. R. Co., 55 Iowa, 583, the defendant pleaded as a defence that before the commencement of the suit it was agreed, between the plaintiff and plaintiff's attorneys, that said attorneys should carry on the suit at their own costs and expense, and that they should receive for their said services and said costs and expenses about one-sixth of the amount of the recovery, if the litigation should be successful, and if they should fail in the action they should receive nothing. It was averred that said agreement and contract was against public policy, champertous and void. The court said: "It seems to us that there is no sound reason nor just principle in a rule which would allow a party to defeat a just cause of action because the opposite party has made a contract with his attorney which is utterly void and, which, therefore cannot be enforced by either of the contracting parties. As to the defendant in this action who seeks to avail itself of the illegal contract, the rights of the parties are the same as if it had never been made. The plaintiff is still the real party in interest. The illegal and champertous contract, being void, divests him of no right. That by reason thereof he should be disabled from asserting his rights, we do not believe. It is enough that the parties to such contracts be authorized to repudiate them, without allowing others to exonerate themselves from just obligations by reason thereof. As is said by Day, J., in Allison v. C. & N. W. R. Co., 42 Iowa, 274, 'If he (the defendant in the action) could do so, an unheard of effect would be given to a void agreement. Suppose a suit upon a promissory note is prosecuted under a champertous agreement between the plaintiff and his attorneys; does this avail the defendant to defeat an otherwise just liability? Will not the law rather compel the defendant to perform his undertakings and leave the question of champerty to be determined between the plaintiff and his attorney?'" See 6 Cyc. 880 (49).

and it would now nowhere be held to be in itself unlawful for a lawyer to give his services to prosecute a suit, with the understanding that his services are to be free unless success shall give to his client the ability to pay him, and that in that case he will expect liberal fees. There may be circumstances in which such a contract would be meritorious; and there may be circumstances in which it would partake of the worst evils of maintenance. Under what circumstances a contract of that nature might be held void as against public policy, we need not consider. The contract under consideration was nothing more than an agreement by the plaintiff to give his services without charge if the suit should not be successful, and an agreement by the defendants to pay large and liberal fees if successful; and we know no authority and no reason in public policy why, under the relations and circumstances of the parties, it was not a lawful contract, which they had a right to enter into.[1]

6 Cyc. 858–860 (37–46); 16 H. L. R. 594.

Agreements which are contrary to good morals.

BOIGNERES *v.* BOULON.

54 CALIFORNIA, 146.—1880.

Appeal from judgment of nonsuit, and order denying new trial.

Department No. 1, by the COURT (from the Bench):

The only evidence in respect to the alleged promise of marriage is the testimony of the plaintiff herself. She declares—such is the effect of her language—that the only consideration for the promise was that she should continue the immoral and illegal relation toward defendant as his mistress, which she had held previous to the promise. This is only saying that he promised to marry her at some date not mentioned, if she would continue to surrender her person to him as she had done in the past.

It has been held, and we think correctly, that such promise or surrender on the part of the woman is not sufficient consideration for a

[1] "The first objection of the plaintiffs in error is that the contract set up in declaration is one for a contingent compensation. Such a defense in some jurisdictions would be a good one; but a settled rule of this court is the other way. Reported cases to that effect show that the proposition is one beyond legitimate controversy. Wylie v. Coxe, 15 How. 415; Wright v. Tebbitts, 91 U. S. 252."—Stanton v. Embrey, 93 U. S. 548. "This, however, does not remove the suspicion which naturally attaches to such contracts, and where it can be shown that they are obtained from the suitor by any undue influence of the attorney over the client, or by any fraud or imposition, or that the compensation is clearly excessive, so as to amount to extortion, the court will in a proper case protect the party aggrieved."—Taylor v. Bemiss, 110 U. S. 42.

promise of marriage, because immoral, illegal, and against public policy. On the authority of Hanks v. Naglee, November Term, 1879, the judgment must be affirmed. So ordered.

9 Cyc. 516–517 (99, 1–4); W. P. 411 (65).

KURTZ *v.* FRANK.

76 INDIANA, 594.—1881.

Action by the appellee against the appellant for a breach of promise of marriage. Verdict for plaintiff. Defendant appeals from an order denying motion for new trial.

WOODS, J. . . . The plaintiff testified that the defendant promised to marry her in September or October (1878); that he said he would marry her in the fall if they could agree and get along, and be true to each other; but, if she became pregnant from their intercourse, he would marry her immediately. She did become pregnant, about the middle of July, 1878, and informed the defendant of the fact as soon as aware of it. Upon this evidence, it is insisted that the agreement to marry immediately in case of the plaintiff's pregnancy, is void, because immoral, and that, aside from this part of the agreement, the defendant had until the first of December within which to fulfill his engagement; and, consequently, that the suit, begun as it was before that date, was prematurely brought.

It does not appear that the illicit intercourse entered into the consideration of the marriage contract, but the appellant, having agreed to marry the appellee at a time then in the future, obtained the intercourse upon an assurance that, if pregnancy resulted, the contract already made should be performed at once. This did not supersede the original agreement, but fixed the time for its performance. Clark v. Pendleton, 20 Conn. 495.

We are not prepared to lend judicial sanction and protection to the seducer by declaring that he may escape the obligation of his contract, so made, on the plea that it is immoral. But if this were otherwise, and if, by its terms, the contract was not to have been performed until the time subsequent to the commencement of the suit, yet if, before the suit was brought, the appellant had renounced the contract, and declared his purpose not to keep it, that constituted a breach, for which the appellee had an immediate right of action. Burtis v. Thompson, 42 N. Y. 246; Holloway v. Griffith, 32 Iowa, 409; S. C. 7 Am. Rep. 208, n; Frost v. Knight, L. R. 7 Exch. 111; S. C. 1 Moak's Eng. Rep. 218.

We cannot say that the award of damages was excessive.

Judgment affirmed, with costs.

9 Cyc. 516 (99); W. P. 361 (13); 365 (31); 411 (65).

Agreements which affect the freedom or security of marriage.

STERLING *v.* SINNICKSON.

2 SOUTHARD (NEW JERSEY), 756.—1820.

Declaration in debt on a sealed bill, which was as follows:

"I, Seneca Sinnickson, am hereby bound to Benjamin Sterling, for the sum of one thousand dollars, provided he is not lawfully married in the course of six months from the date hereof. Witness my hand and seal. Burlington, May 16, 1816.

"SENECA SINNICKSON (*Seal*).

"Witness, JAMES S. BUDD."

Defendant demurred generally, and plaintiff joined in demurrer.

KIRKPATRICK, C. J. . . . The contract was not only useless and nugatory, but it was contrary to the public policy.

Marriage lies at the foundation, not only of individual happiness, but also of the prosperity, if not the very existence, of the social state; and the law, therefore, frowns upon, and removes out of the way, every rash and unreasonable restraint upon it, whether by way of penalty or inducement.

If these parties had entered into mutual obligations, the plaintiff not to marry within six months, and the defendant to pay him therefor this sum of $1000, there can be no doubt, I think, but that both the obligations would have been void. In the case of Key v. Bradshaw (2 Vern. 102), there was a bond in the usual form, but proved to be upon an agreement to marry such a man, or to pay the money mentioned in the bond; but the bond was ordered to be canceled it being contrary to the nature and design of marriage which ought to proceed from free choice, and not from any restraint or compulsion. In the case of Baker v. White (2 Vern. 215), A gave her bond to B for £100 if she should marry again, and B gave her his bond for the same sum, to go towards the advancement of her daughter's portion, in case she should not marry. It was, as Lord Mansfield says in Lowe v. Peers (Bur. 2231), a mere wager, and nothing unfair in it; and yet A was relieved against her bond, because it was in restraint of marriage, which ought to be free. A bond, therefore, to marry, if there be no obligation on the other side, no mutual promise, or a bond not to marry, are equally against law. They are both restraints upon the freedom of choice and of action, in a case where the law wills that all shall be free. If the consideration for which this money was to be paid, then, was the undertaking of the plaintiff not to marry, that consideration was unlawful. He would have been relieved against it, either at law or in equity; and if so, the corresponding obligation to pay, according to the principle above stated, is void.

It has been spoken of by the plaintiff, as if it were an obligation to pay money upon a future contingency, which any man has a right to make, either with or without consideration, and as if the not marrying of the plaintiff were not the consideration of the obligation, but the contingent event only, upon which it became payable. But I think this is not the correct view of the case. Where the event upon which the obligation becomes payable is in the power of the obligee, and is to be brought about by his doing or not doing a certain thing, it cannot be so properly called a *contingency;* it is rather the *condition meritorious,* upon which the obligation is entered into, the moving consideration for which the money is to be paid. It is not, therefore, to be considered as a mere *contingency,* but as a *consideration,* and it must be such consideration as the law regards.

Nor does it at all vary the case that the restraint was for six months only. It was still a restraint, and the law has made no limitation as to the time. Neither can the plaintiff's performance, on his part, help him. It imposed no obligation upon the defendant; it was wholly useless to him; the contract itself was void from the beginning. Therefore, in my opinion, let there be judgment for the defendant.

Judgment for defendant.[1]

9 Cyc. 518–519 (5–10); W. P. 465 (31); 17 H. L. R. 423.

CROSS *v.* CROSS.

58 NEW HAMPSHIRE, 373.—1878.

Writ of entry on a mortgage given by defendant to M. for plaintiff, in consideration that she should re-convey to him certain lands, and should then file a bill for divorce which he agreed not to defend. This agreement was executed, the divorce was granted, and M. assigned the notes and mortgage to plaintiff.

CLARK, J. When the notes and mortgage were given, the plaintiff was the wife of the defendant; and the principal object of the agree-

[1] "The substance of the contract is, if the applicant will pay the association a certain sum of money down, and agree to pay such dues and assessments as it may demand upon expressed terms from time to time, it will pay the applicant at the end of two years the sum of $3960, upon condition that the applicant should not get married within that time, but if he should marry within that time, then the association was to pay him $5.50 for each day that he remained single, after the execution of the contract. The amount to be paid by the association is dependent upon the time the member refrains from marriage. We think this contract is contrary to public policy and void. . . . A promise to pay money in consideration of not marrying cannot be enforced. 2 Parsons Con. 73, note (h)."—Franklin, C., in Chalfant v. Payton, 91 Ind. 202, 206, 207.

ment, in pursuance of which the notes and mortgage were executed, was to obtain a collusive divorce. Such an agreement is contrary to sound public policy, and consequently illegal and void. The marriage contract is not to be dissolved or determined at the will or caprice of the parties. If annulled, it must be in accordance with the requirements of the law, and in due course of legal proceedings. The whole agreement and proceedings of the parties in this case were a fraud upon the law, and if the facts had come to the knowledge of the court, a divorce would not have been granted. The law will not aid either party in enforcing their illegal contract. The consideration of the notes secured by the mortgage being illegal and void, the action cannot be maintained. The principles of law governing this case were considered and settled in Sayles v. Sayles, 21 N. H. 312, and Weeks v. Hill, 38 N. H. 199.

Judgment for the defendant.

9 Cyc. 519 (11); 522 (22-24); W. P. 444 (7).

POLSON *v.* STEWART.

167 MASSACHUSETTS, 211.—1897.

A husband, in order to induce his wife to forbear from bringing a suit for divorce, to which she was entitled, covenanted to surrender to her all his rights in lands owned by her.

HOLMES, J. [After deciding that this contract, made in North Carolina, under whose laws the husband and wife were competent to contract with each other, could be enforced as to lands situated in Massachusetts.] Objection is urged against the consideration. The instrument is alleged to have been a covenant. It is set forth, and mentions one dollar as the consideration. But the bill alleges others, to which we have referred. It is argued that one of them, forbearance to bring a well-founded suit for divorce, was illegal. The judgment of the majority in Merrill v. Peaslee (146 Mass. 460) expressly guarded itself against sanctioning such a notion, and decisions of the greatest weight referred to in that case show that such a consideration is both sufficient and legal. Newsome v. Newsome, L. R. 2 P. & D. 306, 312; Wilson v. Wilson, 1 H. L. Cas. 538, 574; Besant v. Wood, 12 Ch. D. 605, 622; Hart v. Hart, 18 Ch. D. 670, 685; Adams v. Adams, 91 N. Y. 381; Sterling v. Sterling, 12 Ga. 20.

Demurrer overruled.[1]

9 Cyc. 522 (23-24); W. P. 444 (7).

[1] In Merrill v. Peaslee (146 Mass. 460) referred to above, the court (three judges dissenting) held that where a wife had left her husband on account of extreme cruelty, and was about to bring a suit for divorce, a promise by the

Agreements in restraint of trade.

DIAMOND MATCH CO. *v.* ROEBER.

106 NEW YORK, 473.—1887.

Appeal from judgment of the General Term of the Supreme Court in the first judicial department, made March 20, 1885, which modified as to an additional allowance of costs and affirmed, as modified, a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

This action was brought to restrain the defendant from engaging in the manufacture or sale of friction matches in violation of a covenant in a bill of sale executed by defendant, which is set forth in the opinion, wherein also the material facts are stated.

ANDREWS, J. Two questions are presented: *First.* Whether the covenant of the defendant contained in the bill of sale executed by him to the Swift & Courtney & Beecher Company on the 27th day of August, 1880, "that he shall and will not, at any time or times within ninety-nine years, directly or indirectly, engage in the manufacture or sale of friction matches (excepting in the capacity of agent or employé of said The Swift & Courtney & Beecher Company), within any of the several States of the United States of America, or in the Territories thereof, or within the District of Columbia, excepting and reserving, however, the right to manufacture and sell friction matches in the State of Nevada and in the Territory of Montana," is void as being a covenant in restraint of trade; and, *second,* as to the

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husband to pay her $5000 on consideration that she would forego the suit for divorce and would return to him and live with him as his wife, was founded upon an illegal consideration so far as it consisted of the resumption of the marital relations. "It is as much against public policy to restore interrupted conjugal relations for money, as it is to continue them without interruption for the same consideration." In Adams v. Adams (91 N. Y. 381) the wife withdrew a divorce suit, condoned the offense, and returned to live with the husband on his promise to pay her $1000, and it was held that this was a valid and enforceable promise, and in no way against public policy.

In Noice v. Brown, 38 N. J. L. 228, the defendant, being a married man, and living apart from his wife, and in expectation of a divorce from her by force of a bill then pending, promised the plaintiff to marry her in a reasonable time after such divorce should have been obtained. The court said: "I cannot see the faintest semblence of legality in the promise here laid. It is wholly fallacious to suppose that a contract is not illegitimate if the act agreed to be done would not be illegal at the time of the contemplated performance. Such is not the law. A contract is totally void, if when it is made, it is opposed to morality or public policy. The institution of marriage is the first act of civilization, and the protection of the married state against all molestation or disturbance is a part of the policy of every people possessed of morals and laws."

right of the plaintiff, under the special circumstances, to the equitable remedy by injunction to enforce the performance of the covenant.

There is no real controversy as to the essential facts. The consideration of the covenant was the purchase by the Swift & Courtney & Beecher Company, a Connecticut corporation, of the manufactory No. 528 West Fiftieth Street, in the city of New York, belonging to the defendant, in which he had, for several years prior to entering into the covenant, carried on the business of manufacturing friction matches, and of the stock and materials on hand, together with the trade, trade-marks, and good will of the business, for the aggregate sum (excluding a mortgage of $5000 on the property, assumed by the company) of $46,724.05, of which $13,000 was the price of the real estate. By the preliminary agreement of July 27, 1880, $28,000 of the purchase price was to be paid in the stock of the Swift & Courtney & Beecher Company. This was modified when the property was transferred August 27, 1880, by giving to the defendant the option to receive the $28,000 in the notes of the company or in its stock, the option to be exercised on or before January 1, 1881. The remainder of the purchase price, $18,724.05, was paid down in cash, and subsequently, March 1, 1881, the defendant accepted from the plaintiff, the Diamond Match Company, in full payment of the $28,000, the sum of $8000 in cash and notes, and $20,000 in the stock of the plaintiff, the plaintiff company having, prior to said payment, purchased the property of the Swift & Courtney & Beecher Company and become the assignee of the defendant's covenant. It is admitted by the pleadings that in August, 1880 (when the covenant in question was made), the Swift & Courtney & Beecher Company carried on the business of manufacturing friction matches in the States of Connecticut, Delaware, and Illinois, and of selling the same "in the several States and Territories of the United States and in the District of Columbia"; and the complaint alleges, and the defendant in his answer admits, that he was at the same time also engaged in the manufacture of friction matches in the city of New York, and in selling them in the same territory. The proof tends to support the admission in the pleadings. It was shown that the defendant employed traveling salesmen, and that his matches were found in the hands of dealers in ten States. The Swift & Courtney & Beecher Company also sent their matches throughout the country wherever they could find a market. When the bargain was consummated, on the 27th of August, 1880, the defendant entered into the employment of the Swift & Courtney & Beecher Company, and remained in its employment until January, 1881, at a salary of $1500 a year. He then entered into the employment of the plaintiff and remained with it during the year 1881, at a salary of $2500 a year, and from January 1, 1882, at a salary of $3600 a year, when a disagreement arising as to

the salary he should thereafter receive, the plaintiff declining to pay a salary of more than $2500 a year, the defendant voluntarily left its service. Subsequently he became superintendent of a rival match manufacturing company in New Jersey, at a salary of $5000, and he also opened a store in New York for the sale of matches other than those manufactured by the plaintiff. The contention by the defendant that the plaintiff has no equitable remedy to enforce the covenant, rests mainly on the fact that contemporaneously with the execution of the covenant of August 27, 1880, the defendant also executed to the Swift & Courtney & Beecher Company a bond in the penalty of $15,000, conditioned to pay that sum to the company as liquidated damages in case of a breach of his covenant.

The defendant for his main defense relies upon the ancient doctrine of the common law first definitely declared, so far as I can discover, by Chief Justice Parker (Lord Macclesfield) in the leading case of Mitchel v. Reynolds (1 P. Williams, 181), and which has been repeated many times by judges in England and America, that a bond in general restraint of trade is void. There are several decisions in the English courts of an earlier date in which the question of the validity of contracts restraining the obligor from pursuing his occupation within a particular locality was considered. The cases are chronologically arranged and stated by Mr. Parsons in his work on Contracts, Vol. 2, p. 748, note. The earliest reported case, decided in the time of Henry V., was a suit on a bond given by the defendant, a dyer, not to use his craft within a certain city for the space of half a year. The judge before whom the case came indignantly denounced the plaintiff for procuring such a contract, and turned him out of court. This was followed by cases arising on contracts of a similar character, restraining the obligors from pursuing their trade within a certain place for a certain time, which apparently presented the same question which had been decided in the dyer's case, but the courts sustained the contracts and gave judgment for the plaintiffs; and, before the case of Mitchel v. Reynolds, it had become settled that an obligation of this character, limited as to time and space, if reasonable under the circumstances and supported by a good consideration, was valid. The case in the Year Books went against all contracts in restraint of trade, whether limited or general. The other cases, prior to Mitchel v. Reynolds, sustained contracts for a particular restraint, upon special grounds, and by inference decided against the validity of general restraints. The case of Mitchel v. Reynolds was a case of partial restraint and the contract was sustained. It is worthy of notice that most, if not all, the English cases which assert the doctrine that all contracts in general restraint of trade are void, were cases where the contract before the court was limited or partial. The same is generally true of the American cases. The principal cases in

this State are of that character, and in all of them the particular contract before the court was sustained (Nobles v. Bates, 7 Cow. 307; Chappel v. Brockway, 21 Wend. 157; Dunlop v. Gregory, 10 N. Y. 241). In Alger v. Thacher (19 Pick. 51), the case was one of general restraint, and the court, construing the rule as inflexible that all contracts in general restraint of trade are void, gave judgment for the defendant. In Mitchel v. Reynolds, the court, in assigning the reasons for the distinction between a contract in general restraint of trade, and one limited to a particular place, says, "for the former of these must be void, being of no benefit to either party and only oppressive"; and later on, "because in a great many instances they can be of no use to the obligee, which holds in all cases of general restraint throughout England, for what does it signify to a tradesman in London what another does in Newcastle, and surely it would be unreasonable to fix a certain loss on one side without any benefit to the other." He refers to other reasons, viz.: The mischief which may arise (1) to the party by the loss, by the obligor, of his livelihood and the subsistence of his family; and (2) to the public, by depriving it of a useful member and by enabling corporations to gain control of the trade of the kingdom.

It is quite obvious that some of these reasons are much less forcible now than when Mitchel v. Reynolds was decided. Steam and electricity have, for the purpose of trade and commerce, almost annihilated distance, and the whole world is now a mart for the distribution of the products of industry. The great diffusion of wealth and the restless activity of mankind striving to better their condition, has greatly enlarged the field of human enterprise and created a vast number of new industries, which give scope to ingenuity, and employment for capital and labor. The laws no longer favor the granting of exclusive privileges, and, to a great extent, business corporations are practically partnerships, and may be organized by any persons who desire to unite their capital or skill in business, leaving a free field to all others who desire for the same or similar purpose to clothe themselves with a corporate character.

The tendency of recent adjudications is marked in the direction of relaxing the rigor of the doctrine that all contracts in general restraint of trade are void irrespective of special circumstances. Indeed, it has of late been denied that a hard and fast rule of that kind has ever been the law of England (Rousillon v. Rousillon, L. R. 14 Ch. Div. 351). The law has, for centuries, permitted contracts in partial restraint of trade, when reasonable; and in Horner v. Graves (7 Bing. 735), Chief Justice Tindal considered a true test to be "whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public." When the restraint

is general, but at the same time is coextensive only with the interest to be protected, and with the benefit meant to be conferred, there seems to be no good reason why, as between the parties, the contract is not as reasonable as when the interest is partial and there is a corresponding partial restraint. And is there any real public interest which necessarily condemns the one and not the other? It is an encouragement to industry and to enterprise in building up a trade, that a man shall be allowed to sell the good will of the business and the fruits of his industry upon the best terms he can obtain. If his business extends over a continent, does public policy forbid his accompanying the sale with a stipulation for restraint coextensive with the business which he sells? If such a contract is permitted, is the seller any more likely to become a burden on the public than a man who, having built up a local trade only, sells it, binding himself not to carry it on in the locality? Are the opportunities for employment and for the exercise of useful talents so shut up and hemmed in that the public is likely to lose a useful member of society in the one case and not in the other? Indeed, what public policy requires is often a vague and difficult inquiry. It is clear that public policy and the interests of society favor the utmost freedom of contract, within the law, and require that business transactions should not be trammeled by unnecessary restrictions. "If," said Sir George Jessel, in Printing Company v. Sampson, L. R. 19 Eq. Cas. 462, "there is one thing more than any other which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts when entered into freely and voluntarily, shall be held good, and shall be enforced by courts of justice."

It has sometimes been suggested that the doctrine that contracts in general restraint of trade are void, is founded in part upon the policy of preventing monopolies, which are opposed to the liberty of the subject, and the granting of which by the king under claim of royal prerogative led to conflicts memorable in English history. But covenants of the character of the one now in question operate simply to prevent the covenantor from engaging in the business which he sells, so as to protect the purchaser in the enjoyment of what he has purchased. To the extent that the contract prevents the vendor from carrying on the particular trade, it deprives the community of any benefit it might derive from his entering into competition. But the business is open to all others, and there is little danger that the public will suffer harm from lack of persons to engage in a profitable industry. Such contracts do not create monopolies. They confer no special or exclusive privilege. If contracts in general restraint of trade, where the trade is general, are void as tending to monopolies, contracts in partial restraint, where the trade is local, are subject to the same objection, because they deprive the local community of the

services of the covenantor in the particular trade or calling, and prevent his becoming a competitor with the covenantee. We are not aware of any rule of law which makes the motive of the covenantee the test of the validity of such a contract. On the contrary, we suppose a party may legally purchase the trade and business of another for the very purpose of preventing competition, and the validity of the contract, if supported by a consideration, will depend upon its reasonableness as between the parties. Combinations between producers to limit production and to enhance prices, are or may be unlawful, but they stand on a different footing. We cite some of the cases showing the tendency of recent judicial opinion on the general subject. Whittaker v. Howe, 3 Beav. 383; Jones v. Lees, 1 Hurl. & N. 189; Roussillon v. Roussillon, *supra;* Leather Co. v. Lorsont, L. R. 9 Eq. Cas. 345; Collins v. Locke, L. R. 4 App. Cas. 674; Oregon Steam Co. v. Winsor, 20 Wall. 64; Morse v. Morse, 103 Mass. 73. In Whittaker v. Howe, a contract made by a solicitor not to practice as a solicitor "in any part of Great Britain," was held valid. In Roussillon v. Roussillon, a general contract not to engage in the sale of champagne, without limit as to space, was enforced as being under the circumstances a reasonable contract. In Jones v. Lees, a covenant by the defendant, a licensee under a patent that he would not during the license make or sell any slubbing machines without the invention of the plaintiff applied to them, was held valid. Bramwell, J., said: "It is objected that the restraint extends to all England, but so does the privilege." In Oregon Steam Co. v. Winsor, the court enforced a covenant by the defendant, made on the purchase of a steamship, that it should not be run or employed in the freight or passenger business upon any waters in the State of California for the period of ten years.

In the present state of the authorities we think it cannot be said that the early doctrine that contracts in general restraint of trade are void, without regard to circumstances, has been abrogated. But it is manifest that it has been much weakened, and that the foundation upon which it was originally placed has, to a considerable extent at least, by the change of circumstances, been removed.[1]

The covenant in the present case is partial and not general. It is practically unlimited as to time, but this, under the authorities, is not an objection, if the contract is otherwise good. Ward v. Byrne, 5 M. & W. 548; Mumford v. Gething, 7 C. B. (N. S.) 305, 317. It is limited as to space since it excepts the State of Nevada and the

1 "Recent cases make it very clear that such an agreement is not opposed to public policy even if the restriction was unlimited as to both time and territory. Diamond Match Co. v. Roeber, 106 N. Y. 473; Hodge v. Sloan, 107 Id. 244; Leslie v. Lorillard, 110 Id. 519, 534, Watertown Thermometer Co. v. Pool, 51 Hun, 157."—Tode v. Gross, 127 N. Y. 480.

Territory of Montana from its operation, and therefore is a partial and not a general restraint, unless, as claimed by the defendant, the fact that the covenant applies to the whole of the State of New York constitutes a general restraint within the authorities. In Chappel v. Brockway, *supra,* Bronson, J., in stating the general doctrine as to contracts in restraint of trade, remarked that "contracts which go to the total restraint of trade, as that a man will not pursue his occupation anywhere in the State, are void." The contract under consideration in that case was one by which the defendant agreed not to run or be interested in a line of packet boats on the canal between Rochester and Buffalo. The attention of the court was not called to the point whether a contract was partial, which related to a business extending over the whole country, and which restrained the carrying on of business in the State of New York, but excepted other States from its operation. The remark relied upon was *obiter,* and in reason cannot be considered a decision upon the point suggested. We are of the opinion that the contention of the defendant is not sound in principle, and should not be sustained. The boundaries of the States are not those of trade and commerce, and business is restrained within no such limit. The country, as a whole, is that of which we are citizens, and our duty and allegiance are due both to the State and nation. Nor is it true, as a general rule, that a business established here cannot extend beyond the State, or that it may not be successfully established outside of the State. There are trades and employments which, from their nature, are localized; but this is not true of manufacturing industries in general. We are unwilling to say that the doctrine as to what is a general restraint of trade depends upon State lines, and we cannot say that the exception of Nevada and Montana was colorable merely. The rule itself is arbitrary, and we are not disposed to put such a construction upon this contract as will make it a contract in general restraint of trade, when upon its face it is only partial. The case of Oregon Steam Co. v. Winsor (*supra*) supports the view that a restraint is not necessarily general which embraces an entire State. The defendant entered into the covenant as a consideration in part of the purchase of his property by the Swift & Courtney & Beecher Company, presumably because he considered it for his advantage to make the sale. He realized a large sum in money, and on the completion of the transaction became interested as a stockholder in the very business which he had sold. We are of opinion that the covenant, being supported by a good consideration, and constituting a partial and not a general restraint, and being, in view of the circumstances disclosed, reasonable, is valid and not void.

In respect to the second general question raised, we are of opinion that the equitable jurisdiction of the court to enforce the covenant by injunction, was not excluded by the fact that the defendant, in con-

nection with the covenant, executed a bond for its performance, with a stipulation for liquidated damages. It is, of course, competent for parties to a covenant to agree that a fixed sum shall be paid in case of a breach by the party in default, and that this should be the exclusive remedy. The intention in that case would be manifest that the payment of the penalty should be the price of non-performance, and to be accepted by the covenantee in lieu of performance. Phœnix Ins. Co. v. Continental Ins. Co., 87 N. Y. 400, 405. But the taking of a bond in connection with a covenant does not exclude the jurisdiction of equity in a case otherwise cognizable therein, and the fact that the damages in the bond are liquidated, does not change the rule. It is a question of intention, to be deduced from the whole instrument and the circumstances; and if it appear that the performance of the covenant was intended, and not merely the payment of damages in case of a breach, the covenant will be enforced. It was said in Long v. Bowring (33 Beav. 585), which was an action in equity for the specific performance of a covenant, there being also a clause for liquidated damages, "all that is settled by this clause is that if they bring an action for damages the amount to be recovered is £1000, neither more nor less." There can be no doubt upon the circumstances in this case that the parties intended that the covenant should be performed, and not that the defendant might at his option repurchase his right to manufacture and sell matches on payment of the liquidated damages. The right to relief by injunction in similar contracts is established by numerous cases. Phœnix Ins. Co. v. Continental Ins. Co., *supra;* Long v. Bowring, *supra;* Howard v. Woodward, 10 Jur. N. S. 1123; Coles v. Sims, 5 De G., McN. & G. 1; Avery v. Langford, Kay's Ch. 663; Whittaker v. Howe, *supra;* Hubbard v. Miller, 27 Mich. 15.

There are some subordinate questions which will be briefly noticed. *First.* The plaintiff, as successor of the Swift & Courtney & Beecher Company, and as assignee of the covenant, can maintain the action. The obligation runs to the Swift & Courtney & Beecher Company, "its successors and assigns." The covenant was in the nature of a property-right and was assignable, at least it was assignable in connection with a sale of the property and business of the assignors. Hedge v. Lowe, 47 Iowa, 137, and cases cited. *Second.* The defendant is not in a position which entitles him to raise the question that the contract with the Swift & Courtney & Beecher Company was *ultra vires* the powers of that corporation. He has retained the benefit of the contract and must abide by its terms. Whitney Arms Co. v. Barlow, 68 N. Y. 34. *Third.* The fact that the plaintiff is a foreign corporation is no objection to its maintaining the action. It would be repugnant to the policy of our legislation, and a violation of the rules of comity, to grant or withhold

relief in our courts upon such a discrimination. Merrick v. Van Santvoord, 34 N. Y. 208; Hibernia Nat. Bank v. Lacombe, 84 Id. 367; Code Civ. Pro. § 1779. *Fourth.* The consent of the Swift & Courtney & Beecher Company to the purchase by the defendant of the business of Brueggemann did not relieve the defendant from his covenant. That transaction was in no way inconsistent therewith. Brueggemann was selling matches manufactured by the company, under an agreement to deal in them exclusively.

There are some questions on exceptions to the admission and exclusion of evidence. None of them present any question requiring a reversal of the judgment.

There is no error disclosed by the record and the judgment should, therefore, be affirmed.

All concur, except Peckham, J., dissenting.

Judgment affirmed.[1]

9 Cyc. 523 (27); 529 (70); 22 L. R. A .673; 7 C. L. R. 50; Raymond, Federal Anti-trust Act, 23 H. L. R. 353; Raymond, The Standard oil and tobacco cases, 25 H. L. R. 31; Knowlton, The new doctrine concerning contracts in restraint of trade, 8 Mich. L. R. 298.

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[1] In Gibbs v. Baltimore Gas Co., 130 U. S. 396, the court said: "The decision in Mitchell v. Reynolds, 1 P. Wms. 181; S. C. Smith's Leading Cases, 407, 7th Eng. Ed.; 8th Am. Ed. 756, is the foundation of the rule in relation to the invalidity of contracts in restraint of trade; but as it was made under a condition of things, and a state of society, different from those which now prevail, the rule laid down is not regarded as inflexible, and has been considerably modified. Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained. The question is, whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is, or is not unreasonable. Rousillon v. Rousillon, 14 Ch. D. 351; Leather Cloth Co. v. Lorsont, L. R. 9 Eq. 345."

But in Lufkin Rule Co. v. Fringeli, 57 Ohio St. 596, the court adheres to the view that a contract to keep out of business within the State is invalid, and criticises Diamond Match Co. v. Roeber. The same view is held in Union Strawboard Co. v. Bonfield, 193 Ills. 420.

In Cummings v. Union Blue Stone Co., 164 N. Y. 401, there was an agreement between the producers of at least 90 per cent. of the Hudson river blue stone, and a selling company which engaged (1) to sell all the stone produced by them, for six years, at prices fixed by an association of such producers, and (2) to apportion the sales in specified proportions between them, no sales to be made except through the selling company. The agreement was held illegal, the court saying: "It may be conceded that one of its purposes was to enable the parties to obtain reasonable prices, but it gave them the power to fix arbitrary and unreasonable prices. The scope of the contract, and not the possible self-restraint of the parties to it, is the test of its validity. They could raise prices to what they supposed the market would bear, and as they expected to supply nearly the entire demand of the market, the temptation to extortion was unusually great." The court further said that the case was, "one of such a combination among many dealers as threatened a monopoly, with which the individual would be practically powerless to compete, and the many consumers who would be severally exposed and coerced would be either

Effect of illegality upon contracts in which it exists.

(*i.*) *Divisibility.*

ERIE RAILWAY CO. *v.* UNION LOCOMOTIVE AND EXPRESS CO.

35 NEW JERSEY LAW, 240.—1871.

This suit was in case on promises. Defendants demurred generally to the whole declaration, and there was a joinder.

BEASLEY, C. J. Upon the argument before this court, the counsel for the defendants relied chiefly, in support of the demurrer, upon the proposition that the stipulation contained in the article of agreement, which gave to the plaintiffs the exclusive right to carry locomotives and tenders on trucks over the Erie road, was illegal. The principle that, as common carriers, the defendants were bound to exercise their office with perfect impartiality, in behalf of all persons who apply to them, and that, practicing this public employment, they cannot discharge themselves, by contract, from the obligation, was appealed to in support of this position.

The agreement between these parties was, in short, this: The firm of Kasson & Company, who were the assignors of the plaintiffs, the

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compelled to submit to its exactions, or to forego the purchase of the commodity of customary use needful to them, and but for this monopoly obtainable in the market at a reasonable price."

Price restriction.—In Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373, the court said: "The complainant, a manufacturer of proprietary medicines which are prepared in accordance with secret formulas, presents by its bill a system, carefully devised, by which it seeks to maintain certain prices fixed by it for all the sales of its products both at wholesale and retail. Its purpose is to establish minimum prices at which sales shall be made by its vendees and by all subsequent purchasers who traffic in its remedies. . . . The defendant is a wholesale drug concern which has refused to enter into the required contract, and is charged with procuring medicines for sale at 'cut prices' by inducing those who have made the contracts to violate the restrictions. . . . The present case is not analogous to that of a sale of good will, or of an interest in a business, or of the grant of a right to use a process of manufacture. The complainant has not parted with any interest in its business or instrumentalities of production. It has conferred no right by virtue of which purchasers of its product may compete with it. It retains complete control over the business in which it is engaged, manufacturing what it pleases and fixing such prices for its own sales as it may desire. Nor are we dealing with a single transaction, conceivably unrelated to the public interest. The agreements are designed to maintain prices, after the complainant has parted with the title to the articles, and to prevent competition among those who trade in them. . . . The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic." *Contra*, Garst v. Harris, 177 Mass. 72. As to price restriction on the re-sale of patented articles, see Bauer & Cie. v. O'Donnell, 33 Sup. Ct. Reporter, 616, and cases cited therein.

Union Locomotive and Express Company, agreed to provide "cars and trucks sufficient in size, strength, weight, and capacity whereon to carry all locomotive engines and tenders," and that they would be at the expense of loading and unloading the same; and for the motive power, which was to be supplied by the Erie Railway Company, the defendants, and for the unusual wear and strain of their railway, a certain compensation, which was stated in said articles of agreement, was promised to be paid. On their side, the Erie Railway Company agreed, in addition to the stipulations for providing motive power and giving the use of the road, that the cars of the assignors of plaintiffs should be the only cars employed in the transportation of locomotive engines and tenders. It is this last provision which gives rise to the objection already stated. It is insisted this stipulation gives the plaintiffs the exclusive control, on their own terms, of this branch of business; that it precludes all competition, and being the grant of a monopoly, is inconsistent with the purpose and objects of the charter of the defendants, and with their character as common carriers. The question thus presented is one of much importance, and it should not, consequently, be decided except when it shall be an element essential to the judgment of the court in the particular case. That it is not such an element, on the present occasion, is obvious, for, let it be granted that the provision in question is illegal, and therefore void, still such concession cannot, in the least degree, impair the plaintiffs' right of action. The suit is not for a breach of this promise of the defendants, that no other cars but those of the plaintiffs shall be employed in this branch of the carrying business, but it is for the refusal of the defendants to permit the plaintiffs to transport locomotives and tenders, according to their contract, over the railway of the Erie Company. This latter stipulation, the violation of which forms the ground of action, is distinct and entirely separable from the former one, in which it is alleged the illegality before mentioned exists.

Admitting, then, for the purpose of the argument, the illegality insisted on, the legal problem plainly is this: whether, when a defendant has agreed to do two things, which are entirely distinct, and one of them is prohibited by law, and the other is legal and unobjectionable, such illegality of the one stipulation can be set up as a bar to a suit for a breach of the latter and valid one. This point was but slightly noticed on the argument; nevertheless, an examination of the authorities will show that the rule of law upon the subject has, from the earliest times, been at rest. It was unanimously agreed, in a case reported in the Year Books, 14 Henry VIII. 25, 26, that if some of the covenants of an indenture, or of the conditions indorsed upon a bond, are against law, and some good and lawful, that in such case, the covenants or conditions which are against law

are void *ab initio*, and the others stand good. And from that day to this, I do not know that this doctrine, to the extent of its applicability to this case, has anywhere been disallowed. It was the ground of the judgment in Chesman v. Nainby (2 Lord Raymond, 1456), that being a suit on an apprentice's bond. The stipulation alleged to have been broken was, that the apprentice would not carry on the business in which she was to be instructed, within "the space of half a mile" of the then dwelling-house of the plaintiff. There was also a further stipulation that she should not carry on this business within half a mile of any house into which the plaintiff might remove. The suit was for a breach of the former stipulation, and it was admitted that the latter one was void, as imposing an unreasonable restraint on trade, and it was urged that, by force of this illegal feature, the whole contract was void. But the court were unanimously of opinion that as the breach was assigned upon that part of the condition which was good in law, therefore if the other part, to which exception was taken, was against law, yet that would not hinder the recovery upon part of the condition which was legal. The judgment was afterwards affirmed by the twelve judges, on an appeal to Parliament. 3 Bro. Parl. c. 349.

This rule of law was treated as settled, and was similarly applied in the modern cases of Mallan v. May, 11 M. & W. 653, and Price v. Green, 16 M. & W. 346. This same legal principle will be found to be discussed and illustrated by different applications in the following decisions: Gaskell v. King, 11 East, 165; 15 Ib. 440; Nicholls v. Stretton, 10 Adol. & El. N. S. 346; Chester v. Freeland, Ley R. 79; Sheerman v. Thompson, 11 Adol. & El. 1027.

These and other authorities which might be referred to, settle the rule, that the fact that one promise is illegal will not render another disconnected promise void. The doctrine will not embrace cases where the objectionable stipulation is for the performance of an immoral or criminal act, for such an ingredient will taint the entire contract, and render it unenforceable in all its parts, by reason of the maxim *ex turpi causa non oritur actio*. Nor will it, in general, apply where any part of the consideration is illegal, so that in the present case, if, upon the trial, it should appear that the plaintiffs have agreed to pay to the defendants more than the charter of the latter allows, it may become a question whether this suit will lie. There are many decisions to the effect that where there are a number of considerations, and any one of them is illegal, the whole agreement is avoided, this doctrine being put upon the ground of the impossibility of saying how much or how little weight the void portion may have had as an inducement to the contract. But, at the present stage of the cause, the entire consideration of the promise sued on must

be regarded by the court as unobjectionable, as there is nothing on the record to show any overcharge.

On the ground, then, that both the consideration and the promise, which is the foundation of the action, appear to be valid, the plaintiffs must have judgment on this demurrer.

It is proper to remark that as the demurrer is a general one to the whole declaration, I have considered only the cause of action set out in the first count.

Judgment for plaintiffs.

9 Cyc. 565 (23-24); W. P. 482 (39).

SANTA CLARA VALLEY MILL AND LUMBER CO. *v.* HAYES *et al.*

76 CALIFORNIA, 387.—1888.

Action for damages for breach of contract. Judgment for defendants. Plaintiff appeals.

Defendants agreed to make and deliver to plaintiff during the year 1881 two million feet of lumber at eleven dollars per thousand, and not to manufacture any lumber to be sold during that period in the counties of Monterey, San Benito, Santa Cruz, or Santa Clara, except under the contract, and to pay plaintiff twenty dollars per thousand feet for any lumber so sold to others than plaintiff. This contract was a part of a scheme by which plaintiff got possession by ownership or lease of all the saw-mills in the vicinity of Felton, and shut down several of them to limit the supply of lumber, and to give plaintiff the control of that business.

SEARLES, C. J. . . . The contract was void as being against public policy, and the defendants, as they had a right to do, repudiated the contract. Plaintiff, who has parted with nothing of value, now seeks to recover damages for non-delivery of lumber under this contract. Plaintiff had an undoubted right to purchase any or all the lumber it chose, and to sell at such prices and places as it saw fit, but when as a condition of purchase it bound its vendor not to sell to others under a penalty, it transcended a rule the adoption of which has been dictated by the experience and wisdom of ages as essential to the best interests of the community, and as necessary to the protection alike of individuals and legitimate trade.

With results naturally flowing from the laws of demand and supply, the courts have nothing to do, but when agreements are resorted to for the purpose of taking trade out of the realm of competition, and thereby enhancing or depressing prices of commodities, the courts

cannot be successfully invoked, and their execution will be left to the volition of the parties thereto.

It is claimed by appellant that the contract is divisible, and the first part can stand though the latter be illegal.

If the whole vice of the contract was embodied in the promise of the defendants not to sell lumber to other persons, the illegality would lie in the promise alone, and it might be contended with great force that this promise was divisible from the agreement to sell. Under the findings of the court, however, the illegality inheres in the consideration.

The very essence and mainspring of the agreement—the illegal object—"was to form a combination among all the manufacturers of lumber at or near Felton for the sole purpose of increasing the price of lumber, limiting the amount thereof to be manufactured, and give plaintiff control of all lumber manufactured," etc.

This being the inducement to the agreement, and the *sole object* in view, it cannot be separated and leave any subject matter capable of enforcement, as was done in Granger v. Empire Co., 59 Cal. 678; Treadwell v. Davis, 34 Cal. 601; and Jackson v. Shawl, 29 Cal. 267.

The case falls within the rule of Valentine v. Stewart, 15 Cal. 404; Prost v. More, 40 Cal. 348; More v. Bonnet, 40 Cal. 251; Forbes v. McDonald, 54 Cal. 98; Arnot v. Pittston and Elmira Coal Co., 68 N. Y. 559.

The good cannot be separated from the bad, or rather the bad enters into and permeates the whole contract, so that none of it can be said to be good, and therefore the subject of an action. . . .

The judgment of the court below is affirmed.

9 Cyc. 535 (4); 566 (25); W. P. 468 (39); 482 (39).

BISHOP *v.* PALMER *et al.*

146 MASSACHUSETTS, 469.—1888.

Contract. Demurrer sustained. Plaintiff appeals. Defendants purchased plaintiff's business for $5000, the plaintiff agreeing to transfer to defendants his business at A and his business at B, and covenanting not to engage in the first business again anywhere for five years, or in the second, at B for five years, or to purchase any material from the rival concerns at B.

C. ALLEN, J. The defendants' promise which is declared on was made in consideration of the sale and delivery of the business, plant, property, and contracts of the plaintiff, and of his faithful performance of the covenants and agreements contained in the written instru-

ment signed by the parties. The parties made no apportionment or separate valuation of the different elements of the consideration. The business, plant, property, contracts, and covenants were all combined as forming one entire consideration. There is no way of ascertaining what valuation was put by the parties upon either portion of it. There is no suggestion that there was any such separate valuation, and any estimate which might now be put upon any item would not be the estimate of the parties.

It is contended by the defendants that each one of the three particular covenants and agreements into which the plaintiff entered is illegal and void, as being in restraint of trade. It is sufficient for us to say that the first of them is clearly so; it being a general agreement, without any limitation of space, that for and during the period of five years he will not, either directly or indirectly, continue in, carry on, or engage in the business of manufacturing or dealing in bed-quilts or comfortables, or of any business of which that may form any part. This much is virtually conceded by the plaintiff, and so are the authorities. Taylor v. Blanchard, 13 Allen, 370; Dean v. Emerson, 102 Mass. 480; Morse Twist Drill Co. v. Morse, 103 Mass. 73; Alger v. Thacher, 19 Pick. 51; Oregon Steam Navigation Co. v. Winsor, 20 Wall. 64; Davies v. Davies, 36 Ch. D. 359; 2 Kent Com. 466, note *e;* Met. Con. 232.

Two principal grounds on which such contracts are held to be void are, that they tend to deprive the public of the services of men in the employments and capacities in which they may be most useful, and that they expose the public to the evils of monopoly. Alger v. Thacher, *ubi supra.*

The question then arises, whether an action can be supported upon the promise of the defendants, founded upon such a consideration as that which has been described. As a general rule, where a promise is made for one entire consideration, a part of which is fraudulent, immoral, or unlawful, and there has been no apportionment made or means of apportionment furnished by the parties themselves, it is well settled that no action will lie upon the promise. If the bad part of the consideration is not severable from the good, the whole promise fails. Robinson v. Green, 3 Met. 159, 161; Rand v. Mather, 11 Cush. 1; Woodruff v. Wentworth, 133 Mass. 309, 314; Bliss v. Negus, 8 Mass. 46, 51; Clark v. Ricker, 14 N. H. 44; Woodruff v. Hinman, 11 Vt. 592; Pickering v. Ilfracombe Railway, L. R. 3 C. P. 235, 250; Harrington v. Victoria Graving Dock Co., 3 Q. B. D. 549; 2 Chit. Con. (11th Am. ed.) 972; Leake, Con. 779, 780; Pollock, Con. 321; Met. Con. 247.

It is urged that this rule does not apply to a stipulation of this character, which violates no penal statute, which contains nothing *malum in se,* and which is simply a promise not enforceable at law.

But a contract in restraint of trade is held to be void because it tends to the prejudice of the public. It is therefore deemed by the law to be not merely an insufficient or invalid consideration, but a vicious one. Being so, it rests on the same ground as if such contracts were forbidden by positive statute. They are forbidden by the common law, and are held to be illegal. 2 Kent Com. 466; Met. Con. 221; 2 Chit. Con. 974; White v. Buss, 3 Cush. 448, 450; Hynds v. Hays, 25 Ind. 31, 36.

It is contended that the defendants, by being unable to enforce the stipulation in question, only lose what they knew or were bound to know was legally null; that they have all that they supposed they were getting, namely, a promise which might be kept, though incapable of legal enforcement; and that if they were content to accept such promise, and if there is another good and sufficient consideration, they may be held upon their promise. But this argument cannot properly extend to a case where a part of an entire and inseparable consideration is positively vicious, however it might be where it was simply invalid, as in Parish v. Stone, 14 Pick. 198. The law visits a contract founded on such a consideration with a positive condemnation, which it makes effectual by refusing to support it, in whole or in part, where the consideration cannot be severed.

The fact that the plaintiff had not failed to perform his part of the contract does not enable him to maintain his action. An illegal consideration may be actual and substantial and valuable; but it is not in law sufficient.

The plaintiff further suggests that, if the defendants were to sue him on this contract, they could clearly, so far as the question of legality is concerned, maintain an action upon all its parts, except possibly the single covenant in question. Mallan v. May, 11 M. & W. 653; Green v. Price, 13 M. & W. 695; S. C. 16 M. & W. 346. This may be so. If they pay to the plaintiff the whole sum called for by the terms of the contract, it may well be that they can call on him to perform all of his agreements except such as are unlawful. In such case, they would merely waive or forego a part of what they were to receive, and recover or enforce the rest. It does not, however, follow from this that they can be compelled to pay the sum promised by them, when a part of the consideration of such promise was illegal. They are at liberty to repudiate the contract on this ground; and, having done so, the present action founded on the contract cannot be maintained; and it is not now to be determined what other liability the defendants may be under to the plaintiff, by reason of what they may have received under the contract.

Judgment affirmed.[1]

9 Cyc. 566 (29); W. P. 483 (40); 484 (41).

[1] In Bixby v. Moor, 51 N. H. 402, plaintiff sued to recover for services.

FISHELL *v.* GRAY.

60 NEW JERSEY LAW, 5.—1897.

Action by Fishell against Gray, as receiver of the United States Credit System Company, to recover the purchase price of a business, good will, etc. Verdict for plaintiff.

BEASLEY, C. J. A sealed agreement is the basis of this suit. The parties to the deed were the plaintiff, Fishell, and the United States Credit System Company, a corporation, that has become insolvent, and is now represented by Gray, as receiver. By this instrument the plaintiff assigned to the company just designated the good will of a large and valuable business for the insurance of merchants against losses which he had carried on and established, together with certain personal property, and in addition stipulated as follows, viz.:

"*Fourth.* That the said party of the second part, for the consideration aforesaid, hereby agrees not to interest himself, or engage in, or have others interest themselves for his benefit or in his behalf in any manner, in any company, corporation, or firm whose business is that of guarantying merchants or others against loss in business; and, should the said party of the second part violate his agreement in this paragraph contained, the payments agreed to be made to him in the third paragraph of this contract are to thereupon cease, and to be forfeited forever thereafter."

The action is brought to recover the moneys agreed to be paid by the company in return for the transfer above mentioned, and the covenants contained in the agreement on the part of the plaintiff. The jury, under the instructions of the court, found for the plaintiff, and motion now is to set aside that verdict.

The principal contention against a recovery on the deed in question argued and discussed in the brief of the counsel of the defendant is that the agreement in suit is illegal and void by reason of the stipulation above recited to the effect that the plaintiff would not in any wise engage in the insurance business, whose good will was transferred to the Credit System Company. The proposition

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The defendants kept a billiard saloon and bar. The sale of liquor was illegal. The plaintiff was employed by the defendants to work generally in and about the saloon, but there was no special agreement that he should or should not sell liquors. He opened the saloon, built fires, took care of billiard tables, waited on customers at the bar, and in the absence of defendants had the whole charge of the business. The court said: "We are of opinion that, even if part of the business was lawful, still the plaintiff cannot recover. If the consideration for the defendants' promise to pay the plaintiff a reasonable compensation was the plaintiff's promise to perform both classes of services, the illegal as well as the legal, it is clear that the defendants' promise could not be enforced. A contract is invalid if any part of the consideration on either side is unlawful."

posited is that, as this part of the consideration for the defendant's promise is illegal, the entire contract falls, and that no part of it can be enforced. In support of this position a number of authorities are cited, some of which sustain it. The rule is generally laid down by the text-writers in treating of the effect of an illegal element in the consideration of contracts in terms so general that it embraces the class of stipulations which provide in too broad a form against competition in a given business. According to it, a contract not to compete in a certain business within reasonable bounds as to place is permissible, but, if it possesses too wide a scope, it becomes an unnecessary restraint of trade, and it vitiates all promises that rest upon it, in whole or in part, as a consideration. As a consideration, it was, in the earlier cases, treated as devoid of legal force, but it was deemed to vitiate all other considerations with which it was blended. On this theory an agreement to abstain generally from carrying on a certain business, as in the present case, was treated as though it were an agreement to commit a crime, and, as a consequence, it illegalized everything that it touched. But this view, it has since been perceived, is unnecessarily stringent, and is, in fact, quite unreasonable. There is nothing immoral or criminal in a stipulaton not to engage in a certain business. A man may bind himself to such an abstention without incurring any legal penalty. The only effect is that such an engagement cannot be enforced, either at law or in equity. And this is the aspect in which it is regarded by the modern authorities. This modification of judicial opinion is very pointedly stated in one of the cases cited in the brief of the counsel of the plaintiff. The authority thus vouched is that of Green v. Price (13 Mees. & W. 695), and in it, Pollock, C. B., referring to the sort of agreement now in question, said: "It is not like a contract to do an illegal act. It is merely a covenant, which the law will not enforce, but the party may perform it if he chooses." And upon the citation by counsel of cases holding a contrary doctrine the reply of the chief baron was: "The policy of the law has been altered since that time. It has been found to be beneficial to commerce that there should be a restraint of trade to some extent, and the courts thereupon retrace their steps."

This distinction between a merely unenforceable promise in a matter of this kind and one that is criminal is illustrated in the decision of the case of Erie Ry. Co. *ads.* Union Locomotive & Express Co., [35 N. J. L. 240] the principle being maintained that a stipulation that was not immoral would not vitiate or avoid the entire agreement. And if we regard the dictates of justice alone, no other doctrine is possible. This is obvious from the present case. If it be true that by reason of the promise of the plaintiff to abstain from this business being blended with the residue of the consideration that consisted of valu-

able interests transferred to the company, will prevent a recovery of the price agreed to be paid for such property, and will enable the company to retain it without giving the equivalent agreed upon, a result certainly obtains that would be both wholly unconscionable and impolitic. According to the principle forming the basis of the decision in the Erie Railway case, just cited, that the presence in a contract of one of these inhibited undertakings does not in any degree whatever either add to or deprive it of its legal efficacy, standing alone it will not constitute a legal consideration, nor will it, to any extent, be executed. The later decisions upon the subject appear to regard this as the true principle. Mallan v. May, 11 Mees. & W. 653; Wallis v. Day, 2 Mees. & W. 273.

The other points raised in the brief have been considered, but none of them, as it is deemed, are possessed of sufficient substance to require judicial exposition. They were properly disposed of by the trial judge.

Let the rule be discharged.[1]

9 Cyc. 565 (23); W. P. 482 (39); 484 (41); 14 H. L. R. 614; 21 H. L. R. 549; 1 C. L. R. 321.

[1] In Pierce v. Pierce, 17 Ind. App. 107, it was held that where A sold B his stock and fixtures "including the license to sell" and by law the transfer of the license was illegal, A could recover the purchase price since B was bound to know that no benefit could accrue to him under the transfer of the license, and that therefore the license constituted no part of the consideration.

In King v. King, executor, 63 Oh. St. 363, plaintiff's action was to recover for personal services rendered in the performance of a contract. The contract, as stated in the petition, was that "this plaintiff agreed with the said James Howland that she would refrain from marriage while he should live, and that she would live with him and take care of him while he lived, and he in consideration thereof, agreed that he would provide for her amply sufficient to make her comfortable and well off." Howland in his will left to plaintiff a legacy of five hundred dollars, but save small amounts of money given her from time to time, did not perform the contract. A recovery was had, the court saying, "that contracts in restraint of marriage are void, as being contrary to the public policy of the law, is conceded. But the question here is whether the contract to render service, fully performed by the one party, so rests upon the promise not to marry, or is so tainted by that part of the agreement, as to be incapable of enforcement. The consideration moving to the agreement on the part of Howland to make ample provision for his niece was, on its face, twofold: one, the promise to perform the service agreed upon; the other, not to marry during the continuance of such service. The first was a valid promise and of itself sufficient to support the promise of the other party; the second was a void promise not affording any consideration whatever. As given in text-books and numerous decisions, the general rule is that if one of two considerations for a promise be merely void, the other will support the promise, although if one of two considerations be unlawful, the promise of the other party is void; and yet this rule has many exceptions as will be shown later on. That is, if one of two considerations is void merely for insufficiency, and not for illegality, the other will support the contract. . . . This distinction between a contract merely void, and an illegal contract, would seem to be an important

(*ii.*) *The intention of the parties.*

TYLER *v.* CARLISLE.

79 MAINE, 210.—1887.

Assumpsit. Verdict for defendant.

PETERS, C. J. The plaintiff claims to recover a sum of money loaned by him while the defendant was engaged in playing at cards. The ruling, at the trial, was that, if the plaintiff let the money with an express understanding, intention, and purpose that it was to be used to gamble with, and it was so used, the debt so created cannot be recovered; but otherwise, if the plaintiff had merely knowledge that the money was to be so used. Upon authority and principle the ruling was correct.

Any different doctrine would, in most instances, be impracticable and unjust. It does not follow that a lender has a guilty purpose merely because he knows or believes that the borrower has. There may be a visible line between the motives of the two. If it were not so, men would have great responsibilities for the motives and acts of others. A person may loan money to his friend,—to the man, and not to his purpose. He may at the same time disapprove his purpose. He may not be willing to deny his friend, however much disapproving his acts.

In order to find the lender in fault, he must himself have an intention that the money shall be illegally used. There must be a combination of intention between lender and borrower—a union of purposes. The lender must in some manner be a confederate or participator in the borrower's act, be himself implicated in it. He must loan his money for the express purpose of promoting the illegal design of the borrower; not intend merely to serve or accommodate the man. In support of this view many cases might be adduced. A few prominent ones will suffice. Green v. Collins, 3 Cliff. 494; Gaylord v. Soragen, 32 Vt. 110; Hill v. Spear, 50 N. H. 252; Peck

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one. . . . A void contract is one which has no legal force, and which, for that reason, cannot be enforced; an unlawful contract is one to do an act which the law forbids, or to omit an act which the law enjoins, and for that reason is non-enforceable. There is no provision, either by statute or at common law, which enjoins on any particular person the duty to marry, nor can anyone be punished for not marrying. To marry, or not to marry, is left to the free choice of all who are eligible to marriage. Hence to omit to marry is not illegal, though the promise to omit is one which the law will not enforce. It would appear naturally to follow that the only result of making such a promise would simply be that no legal right could be founded on the promise and no remedy afforded for its breach. It is difficult to see any good reason for denouncing such contract as illegal in the sense of violating any law, or of placing parties who may have entered into it outside of the pale of the law."

v. Briggs, 3 Denio, 107; M'Intyre v. Parks, 3 Met. 207; Banchor v. Mansel, 47 Maine, 58. (See 68 Maine, p. 47.)

Nor was the branch of the ruling wrong, that plaintiff, even though a participator, could recover his money back, if it had not been actually used for illegal purposes. In the minor offenses, the *locus pœnitentiæ* continues until the money has been actually converted to the illegal use. The law encourages a repudiation of the illegal contract, even by a guilty participator, as long as it remains an executory contract or the illegal purpose has not been put in operation. The lender can cease his own criminal design and reclaim his money. "The reason is," says Wharton, "the plaintiff's claim is not to enforce, but to repudiate, an illegal contract." Whar. Con. § 354, and cases there cited. The object of the law is to protect the public—not the parties. "It best comports with public policy, to arrest the illegal transaction before it is consummated," says the court in Stacy v. Foss, 19 Maine, 335. See White v. Bank, 22 Pick. 181.

The rule allowing a recovery back does not apply where the lender knows that some infamous crime is to be committed with the means which he furnishes. It applies only where the minor offenses are involved.

Exceptions overruled.

9 Cyc. 574–575 (72-74); W. P. 485 (42); 487 (43).

GRAVES *et al. v.* JOHNSON.

156 MASSACHUSETTS, 211.—1892.

HOLMES, J. This is an action for the price of intoxicating liquors. It is found that they were sold and delivered in Massachusetts by the plaintiffs to the defendant, a Maine hotel keeper, with a view to their being resold by the defendant in Maine, against the laws of that State. These are all the material facts reported; and these findings we must assume to have been warranted, as the evidence is not reported, so that no question of the power of Maine to prohibit the sales is open. The only question is, whether the facts as stated show a bar to this action.

The question is to be decided on principles which we presume would prevail generally in the administration of the common law in this country. Not only should it be decided in the same way in which we should expect a Maine court to decide upon a Maine contract presenting a similar question, but it should be decided as we think that a Maine court ought to decide this very case if the action were brought there. It is noticeable, and it has been observed by Sir F. Pollock, that some of the English cases which have gone far-

thest in asserting the right to disregard the revenue laws of a country other than that where the contract is made and is to be performed, have had reference to the English revenue laws. Holman v. Johnson, 1 Cowp. 341; Pollock, Con. (5th ed.) 308. See also M'Intyre v. Parks, 3 Met. 207.

The assertion of that right, however, no doubt was in the interest of English commerce (Pellecat v. Angell, 2 Cr., M. & R. 311, 313), and has not escaped criticism (Story, Confl. Laws §§ 257, 254, note; 3 Kent Com. 265, 266; and Wharton, Confl. Laws, § 484), although there may be a question how far the actual decisions go beyond what would have been held in the case of an English contract affecting only English laws. See Hodgson v. Temple, 5 Taunt. 181; Brown v. Duncan, 10 B. & C. 93, 98, 99; Harris v. Runnels, 12 How. 79, 83, 84.

Of course it would be possible for an independent State to enforce all contracts made and to be performed within its territory, without regard to how much they might contravene the policy of its neighbor's laws. But in fact no State pursues such a course of barbarous isolation. As a general proposition, it is admitted that an agreement to break the laws of a foreign country would be invalid. Pollock, Con. (5th ed.) 308. The courts are agreed on the invalidity of a sale when the contract contemplates a design on the part of the purchaser to resell contrary to the laws of a neighboring State, and requires an act on the part of the seller in furtherance of the scheme. Waymell v. Reed, 5 T. R. 599; Gaylord v. Soragen, 32 Vt. 110; Fisher v. Lord, 63 N. H. 514; Hull v. Ruggles, 56 N. Y. 424, 429.

On the other hand, plainly, it would not be enough to prevent a recovery of the price that the seller had reason to believe that the buyer intended to resell the goods in violation of law; he must have known the intention in fact. Finch v. Mansfield, 97 Mass. 89, 92; Adams v. Coulliard, 102 Mass. 167, 173. As in the case of torts, a man has a right to expect lawful conduct from others. In order to charge him with the consequences of the act of an intervening wrongdoer, you must show that he actually contemplated the act. Hayes v. Hyde Park, 153 Mass. 514, 515, 516.

Between these two extremes a line is to be drawn. But as the point where it should fall is to be determined by the intimacy of the connection between the bargain and the breach of the law in the particular case, the bargain having no general and necessary tendency to induce such a breach, it is not surprising that courts should have drawn the line in slightly different places. It has been thought not enough to invalidate a sale, that the seller merely knows that the buyer intends to resell, in violation even of the domestic law. Tracy v. Talmage, 4 Kernan, 162; Hodgson v. Temple, 5 Taunt. 181. So of the law of another State. M'Intyre v. Parks, 3 Met. 207; Sortwell v. Hughes, 1 Curt. C. C. 244; Green v. Collins, 3 Cliff. 494; Hill v.

Spear, 50 N. H. 253; Dater v. Earl, 3 Gray, 482, in a decision on New York law.

But there are strong intimations in the later Massachusetts cases that the law on the last point is the other way. Finch v. Mansfield, 97 Mass. 89, 92; Suit v. Woodhall, 113 Mass. 391, 395. And the English decisions have gone great lengths in the case of knowledge of intent to break the domestic law. Pearce v. Brooks, L. R. 1 Ex. 213; Taylor v. Chester, L. R. 4 Q. B. 309, 311.

However this may be, it is decided that when a sale of intoxicating liquor in another State has just so much greater proximity to a breach of the Massachusetts law as is implied in the statement that it was made with a view to such a breach, it is void. Webster v. Munger, 8 Gray, 584; Orcutt v. Nelson, 1 Gray, 536, 541; Hubbell v. Flint, 13 Gray, 277, 279; Adams v. Coulliard, 102 Mass. 167, 172, 173. Even in Green v. Collins and Hill v. Spear, the decision in Webster v. Munger seems to be approved. See also Langton v. Hughes, 1 M. & S. 593; M'Kinnell v. Robinson, 3 M. & W. 434, 441; White v. Buss, 3 Cush. 448. If the sale would not have been made but for the seller's desire to induce an unlawful sale in Maine, it would be an unlawful sale on the principles explained in Hayes v. Hyde Park, 153 Mass. 514, and Tasker v. Stanley, 153 Mass. 148. The overt act of selling which otherwise would be too remote from the apprehended result, an unlawful sale by some one else, would be connected with it, and taken out of the protection of the law by the fact that the result was actually intended. We do not understand the judge to have gone so far as we have just supposed. We assume that the sale would have taken place, whatever the buyer had been expected to do with the goods. But we understand the judge to have found that the seller expected and desired the buyer to sell unlawfully in Maine, and intended to facilitate his doing so, and that he was known by the buyer to have that intent. The question is whether the sale is saved by the fact that the intent mentioned was not the controlling inducement to it. As the connection between the act in question, the sale here, and the illegal result, the sale in Maine—the tendency of the act to produce the result—is only through the later action of another man, the degree of connection or tendency may vary by delicate shades. If the buyer knows that the sale is made only for the purpose of facilitating his illegal conduct, the connection is at the strongest. If the sale is made with the desire to help him to his end, although primarily made for money, the seller cannot complain if the illegal consequence is attributed to him. If the buyer knows that the seller, while aware of his intent, is indifferent to it, or disapproves of it, it may be doubtful whether the connection is sufficient. Compare Commonwealth v. Churchill, 136 Mass. 148, 150. It appears to us not unreasonable to draw the

line as it was drawn in Webster v. Munger, and to say that, when the illegal intent of the buyer is not only known to the seller, but encouraged by the sale as just explained, the sale is void. The accomplice is none the less an accomplice because he is paid for his act. See Commonwealth v. Harrington, 3 Pick. 26.

The ground of the decision in Webster v. Munger is, that contracts like the present are void. If the contract had been valid, it would have been enforced. Dater v. Earl, 3 Gray, 482; M'Intyre v. Parks, 3 Met. 207. As we have said or implied already, no distinction can be admitted based on the fact that the law to be violated in that case was the *lex fori*. For if such a distinction is ever sound, and again, if the same principles are not always to be applied, whether the law to be violated is that of the State of the contract or of another State (see Tracy v. Talmage, 4 Kernan, 162, 213), at least the right to contract with a view to a breach of the laws of another State of this Union ought not to be recognized as against a statute passed to carry out fundamental beliefs about right and wrong, shared by a large part of our own citizens. Territt v. Bartlett, 21 Vt. 184, 188, 189. In the opinion of a majority of the court, this case is governed by Webster v. Munger, and we believe that it would have been decided as we decide it, if the action had been brought in Maine instead of here. Banchor v. Mansel, 47 Maine, 58.

Exceptions sustained.[1]

9 Cyc. 571-573 (50-62, 67); 15 L. R. A. 834; W. P. 432 (90); 485 (42); 14 H. L. R. 381; 40 Amer. L. Reg. 549.

[1] In Hull v. Ruggles, 56 N. Y. 424, the action was for goods sold and delivered. The defence was that the goods, which consisted of what is known as prize candy packages with some articles of silverware, were intended to be used as a lottery, of which plaintiff had notice, and that he prepared the goods for that purpose. The court said: "The plaintiff cites, as an authority in his favor, Tracy v. Talmadge, 14 N. Y. 162. That case does hold that mere knowledge by the vendor, that the purchaser intends to make an unlawful use of the property, is not a defence to an action for its price. That is perhaps all that was necessary to decide in that case for the determination of the questions there involved. But it is also said there, that if the vendor, with knowledge of the intent of the purchaser, do anything beyond making the sale, to aid or further the unlawful design, he cannot recover for the property. And in the opinion given there are cited the not unfamiliar English cases, in which it is held, that if goods be bought with the purpose of smuggling them into England, though the vendor have knowledge of the purpose, he may recover the price of the goods if he do nothing to aid in carrying out the design (Holman v. Johnson, Cowp. 341); but if he has so packed the goods as to facilitate the smuggling, he is regarded as *particeps criminis* and cannot recover. Biggs v. Lawrence, 3 T. R. 454; Clugas v. Penaluna, 4 T. R. 466; Waymell v. Reed, 5 T. R. 599. The acts of the plaintiff bring him within the principle established by those authorities."

ANHEUSER-BUSCH BREWING ASSOCIATION *v.* MASON.

44 MINNESOTA, 318.—1890.

COLLINS, J. This action was brought to recover a balance claimed to be due plaintiff (a corporation) for, and on account of, bottled beer sold to the defendant. The answer alleged that at the time of the sale defendant, as plaintiff well knew, was the keeper of a house of prostitution; that plaintiff sold the beer expressly for use and dispensation in and for carrying on and maintaining said house; and that when sold and delivered it was agreed between plaintiff and defendant that the beer was to be paid for out of the profits accruing to the latter from her unlawful occupation. On the trial, defendant made no attempt to establish the defense as pleaded, but relied wholly upon admissions made by plaintiff's agent, when testifying, that he did not know just what was done with the beer, but that, when selling it to defendant, he supposed she would sell or use it in her brothel. On this admission, as we understand the record, the case was dismissed by the trial court.

While it would seem quite unnecessary so to do, it may be well to call attention at the outset to the fact that this case should not be confounded with one wherein the vendor in selling his goods has violated a statute requiring him to first procure a license, as was that of Solomon v. Dreschler, 4 Minn. 197, (278). Nor is it one in which the vendor has sold a proper article of merchandise in a legitimate way, but with the knowledge that it is to be disposed of by the vendee in direct violation of the law; for illustration, a sale of spirituous liquors by a qualified wholesale dealer, with full knowledge that the purchaser intended to retail the same in defiance of a prohibitory law, or without first obtaining the required license to sell, or a sale of poison by a druggist, knowing that it was intended for use in committing murder. The illegality of the transaction now under discussion occurs, if at all, in a matter collateral to the sale, incidentally implicated with it, and out of considerations of public policy solely.

It has been well said that the consideration essential to a valid contract must not only be valuable, but it must be lawful, not repugnant to law or sound policy or good morals. *Ex turpi contractu actio non oritur.* The reports, both English and American, are replete with cases in which contracts of all descriptions have been held invalid on account of an illegality of consideration, illustrations of the acknowledged rule that contracts are unlawful and non-enforceable when founded on a consideration *contra bonos mores,* or against the principles of sound policy, or founded in fraud, or in

contravention of positive provisions of a statute. The utmost difficulty has been experienced by the courts in applying the general rule, however, and an examination of the authorities wherein an application has been necessary will convince the reader that the conclusions reached and announced in the English tribunals are beyond reasonable reconciliation.

This want of harmony, and that more uniform and consistent results have obtained in this country, is thoroughly demonstrated in two cases with us (Tracy v. Talmage,—first opinion by Judge Selden, and the second, on motion for rehearing, by Judge Comstock,—(14 N. Y. 162, and Hill v. Spear, 50 N. H. 253), in each of which the principal cases in both countries are ably and carefully reviewed, and the law applicable to the question involved in this action stated in accordance with the great weight of authority in the United States as well as in England. These cases, now regarded as leading on this side of the Atlantic, announce the rule to be that mere knowledge by a vendor of the unlawful intent of a vendee will not bar a recovery upon a contract of sale, yet, if, in any way, the former aids the latter in his unlawful design to violate a law, such participation will prevent him from maintaining an action to recover. The participation must be active to some extent. The vendor must do something in furtherance of the purchaser's design to transgress, but positive acts in aid of the unlawful purpose are sufficient, though slight. While it is certain that a contract is void when it is illegal or immoral, it is equally as certain that it is not void simply because there is something immoral or illegal in its surroundings or connections. It cannot be declared void merely because it tends to promote illegal or immoral purposes. The American text-writers generally admit this to be the prevailing rule of law in the States upon this point. 1 Whart. Cont. § 343; Hill. Sales, 490, 492; 1 Pars. Cont. 456; Story, Cont. (5th ed.) § 671; Story, Confl. Law, § 253; Greenh. Pub. Pol. 589. However, it has been suggested that this statement is subject to the modification that the unlawful use, of which the vendor is advised, must not be a felony or crime involving great moral turpitude. See Hanauer v. Doane, 12 Wall. 342; Tatum v. Kelley, 25 Ark. 209; Milner v. Patton, 49 Ala. 423; Lewis v. Latham, 74 N. C. 283; Bickel v. Sheets, 24 Ind. 1; Steele v. Curle, 4 Dana, 381.

Without expressly indorsing the result in some of the cases, or all that has been said by the courts in their opinions when making an application to the facts then in hand, of the rule so exhaustively examined and approved in Tracy v. Talmage, and Hill v. Spear, *supra,* we cite, in support of the propositions therein contended for, and upon which we rest a reversal of the order of dismissal made by the court below, Armstrong v. Toler, 11 Wheat. 258; Green v. Collins, 3 Cliff. 494; Dater v. Earl, 3 Gray, 482; Armfield v. Tate,

7 Ired. 258; Read v. Taft, 3 R. I. 175; Cheney v. Duke, 10 Gill & J. 11; Kreiss v. Seligman, 8 Barb. 439; Michael v. Bacon, 49 Mo. 474; Brunswick v. Valleau, 50 Iowa, 120; Webber v. Donnelly, 33 Mich. 469; Bishop v. Honey, 34 Tex. 245; Wright v. Hughes, 119 Ind. 324, 21 N. E. Rep. 907; Feineman v. Sachs, 33 Kan. 621, 7 Pac. Rep. 222; Rose v. Mitchell, 6 Colo. 102; Banchor v. Mansel, 47 Me. 58; Henderson v. Waggoner, 2 Lea, 133; Gaylord v. Soragen, 32 Vt. 110; Mahood v. Tealza, 26 La. Ann. 108; Delavina v. Hill, (N. H.) 19 Atl. Rep. 1000.

The agent who made the sales, upon whose testimony the defendant saw fit to rest her case, knew that she was engaged in the unlawful business of keeping a house of ill fame, and admits also that he supposed the beer would be used or sold in her place of business. Nothing further was shown which connected the plaintiff or its agent with any violation of the law. The burden was upon the defendant to show that an enforcement of the contract would be in violation of the settled policy of the State, or injurious to the morals of its people, and no court should declare a contract illegal on doubtful or uncertain grounds. And it may be difficult to distinguish between the cases in which the vendor, with knowledge of the vendee's unlawful purpose, does not become a confederate, and those wherein he aids and assists to an extent sufficient to vitiate the sale; but this difficulty is not apparent in the case at bar.

Order reversed.[1]

9 Cyc. 571–573 (50–62); W. P. 485 (42).

Pinney, J., in NATIONAL DISTILLING CO. *v.* CREAM CITY CO.

86 WISCONSIN, 352.—1893.

The first defense does not deny any allegation of the complaint, but the substance of it is that the sale and delivery of the goods in question to the defendant was void as against public policy, because the vendor was at the time a member of an unlawful trust or combination formed to unlawfully interfere with the freedom of trade and commerce, and in restraint thereof, and to accomplish the ends therein set forth. It is not claimed in the answer that the trust or combination had acquired control and monopoly of all such goods, or that the defendant might not have purchased the goods in question of other dealers in Milwaukee or elsewhere. Conceding for the purposes of this case, that the trust or combination in ques-

[1] But if the seller intends to aid and abet the immoral purpose, he cannot recover the purchase price of the goods. Reed v. Brewer, 90 Tex. 144.

tion may be illegal, and its members may be restrained from carrying out the purposes for which it was created by a court of equity in a suit on behalf of the public, or may be subject to indictment and punishment, there is, nevertheless, no allegation showing or tending to show that the contract of sale between the plaintiff and defendant was tainted with any illegality, or was contrary to public policy. The argument, if any the case admits of, is that, as the plaintiff was a member of the so-called "trust" or "combination," the defendant might voluntarily purchase the goods in question of it at an agreed price, and convert them to its own use, and be justified in a court of justice in its refusal to pay the plaintiff for them, because of the connection of the vendor with such trust or combination. The plaintiff's cause of action is in no legal sense dependent upon or affected by the alleged illegality of the trust or combination, because the illegality, if any, is entirely collateral to the transaction in question, and the court is not called upon in this action to enforce any contract tainted with illegality or contrary to public policy. The mere fact that the plaintiff is a member of a trust or combination created with the intent and purposes set forth in the answer will not disable or prevent it in law from selling goods within or affected by the provisions of such trust or combination, and recovering their price or value. It does not appear that it had stipulated to refrain from such transactions. A contrary doctrine would lead to most startling and dangerous consequences. The defendant is not a party to any illegal contract, and the case is, therefore, not within the rule of Wheeler v. Russell, 17 Mass. 281, and many similar cases, to the effect that "no action will lie upon a contract made in violation of a statute or a principle of the common law"; for the right of the plaintiff to make the sale in question, or of the defendant to buy, was in no way connected with or dependent upon the alleged trust or combination, although the plaintiff was a member of it. These views are sustained and illustrated by the cases of Brooks v. Martin, 2 Wall. 70, and Sharp v. Taylor, 2 Phil. Ch. 801; and many other cases might be cited to the same effect.

27 Cyc. 906 (43); W. P. 490 (50); 22 H. L. R. 435.

(*iii.*) *Securities for money due on an illegal transaction.*

BROWN *v.* KINSEY.

81 NORTH CAROLINA, 245.—1879.

DILLARD, J. The case in the court below was four appeals from a justice's court, founded on four bonds executed by the testator of the defendant on the 13th of September, 1872, to Winefred Hill, and

assigned by her after due, to the plaintiff. By order of the court, the actions were consolidated, and the trial was had by a jury on the issue joined on the plea of immoral consideration, and the evidence relied on by the defendant being all in, His Honor being of opinion that the same was not such as reasonably to warrant a finding of the matter of avoidance pleaded, so held. Thereupon the verdict was for the plaintiff, and the defendant appealed.

The question on the appeal is whether the evidence adduced was or was not such as in law to authorize and require the judge to submit it to the jury upon which to find the fact of immoral consideration alleged by the defendant.

The evidence was that the testator of defendant died in October, 1872, and that about five years before his death Winefred Hill, the assignor of the plaintiff, gave birth to a bastard child begotten by him (said testator), and afterwards, in the course of the same illicit intercourse, he executed to her a bond under seal for three hundred dollars. Winefred, on her death, said he owed her nothing, and that when the bond was delivered to her, testator made no declaration as to his reason, or to the consideration moving him thereto. Upon the death of testator's wife, the said Winefred went to live in the house of testator, and took charge of his domestic business about a month before the testator died. And whilst there, on the 13th of September, 1872, during the continuance of the immoral connection, the testator took up the bond for $300 and destroyed it, and then and there executed to said Winifred the four bonds now in suit, one of them falling due on each first day of January in the next four succeeding years, stating at the time that they were executed in place of the bond for $300, and he made no declaration to the motive for the substitution or the consideration on which they were founded.

Upon the issue joined, the bonds under which the plaintiff claims, being under seal, the execution and delivery made them effectual at law, made them *deeds, things done;* and by the common law they had the force and effect to authorize plaintiff to recover without any consideration, with power, however, in the defendant to have the same held null upon proof of illegal or immoral consideration, not from any motive of advantage to him or his testator, but from consideration of the public interest and morality. Harrell v. Watson, 63 N. C. 454; 2 Chitty on Contracts, 971; Collins v. Blantem, 1 Smith's Lead. Cases, 153.

On the trial, then, we are to take it that plaintiff was absolutely entitled to recover, unless the defendant showed the immoral consideration alleged, by evidence full and complete, or by proof of such facts and circumstances as would reasonably warrant a jury to find it as a fact. In other words, the *onus* was on the defendant, and in order to defeat the recovery it was incumbent on him to

show that the bonds were not voluntary, that is, not executed as a mere gift, and not on the consideration of past cohabitation, which is legal, but on the consideration in whole or part for future criminal intercourse, or to show that the nature of the securities was such as to hold out inducement or constitute a temptation to Winefred Hill to continue the connection.

It is indisputable that the bonds, if executed as a gift by the testator of the defendant to Winefred Hill, the mother of his bastard child, would be legal and enforceable, it not being immoral to assist her by gift to raise his progeny; and it is equally settled that if they were given for past cohabitation, they would be binding on the ground that the illicit connection was an evil already past and done, and the public had no interest to defeat them. The only restriction put on the contracts of the parties is that they shall not stipulate for future fornication, or in such manner as that the security given shall operate as an inducement or motive to go on in the vicious course. 2 Chitty on Contracts, 979; Trovinger v. McBurney, 5 Cowen, 253; Gray v. Mathias, 5 Vesey's Ch. Rep. 286.

In these cases it is held that the continuation of the criminal intercourse after the execution of the bond or contract impeached for immorality, does not invalidate the same; but that it is to be avoided and held null only on proof that it was executed in whole or part on the understanding that the connection was to continue. This will be apparent from the following extracts taken therefrom: In the case of Trovinger v. McBurney, *supra,* the court say: "A bond executed for the cause of past cohabitation, although the connection is continued, is not invalidated thereby." The test always is, does it appear by the contract itself, or was there any understanding of the parties, though not expressed, that the connection was to continue. In the case of Gray v. Mathias, *supra,* a bond was given during the cohabitation, and in the course of the cohabitation, a second bond was given, which, upon its face, recited the existing illegal connection, and stipulated for its continuance with an annuity for the woman in case of discontinuance, and it was held that the last bond was void, but the former one was good, although the cohabitation continued after its execution.

In the case of Hall v. Palmer (3 Hare, 532) the bond was executed to the woman conditioned to pay an annuity from and after the death of the obligor, and the parties lived together at the time and continued so to live afterwards, upon a declaration of the obligor that he did not intend to break off the connection; and upon a reference to the master, it being found as a fact that it was given for past cohabitation, it was held that the continuance of the connection after the execution of the obligation had no effect to invalidate it.

From the principles decided in these cases, it may be taken as

settled, that the cohabitation of the testator of defendant with Winefred Hill, after the execution of the bonds to her, did not by any legal presumption invalidate the same; and that the same could only be held void on proof that there was an understanding, express or implied, that the criminal intercourse was to be continued. Applying these principles to our case we have this state of things: At the time the first bond for $300 was given, Winefred testified that testator of defendant owed her nothing, and therefore the bond was voluntary; or if not that, then it may have been on consideration of past cohabitation, and if so, it was valid; or it may have been partly for past and partly for future, or altogether for future intercourse, and if the latter, then the *onus* was on the defendant to prove it otherwise than by mere evidence of a continued connection after the bonds were executed.

The defendant, on the trial of the issue, had no proof, except of the execution of the bonds in the course of an illegal intimacy between the parties, and a continuation thereof afterwards up to the death of the testator, together with an admission by Winefred, that they were not executed for any debt due her; and obviously, in such state of the proof, the jury could not have done more than have a suspicion and conjecture, whether the bonds were executed as a gift, or for past cohabitation, or wholly or in part for future cohabitation.

The rule is well settled that if there be no evidence, or if the evidence be so slight as not reasonably to warrant the inference of the fact in issue, or furnish more than materials for a mere conjecture, the court will not leave the issue to be passed on by the jury, but rule that there is no evidence to be submitted to their consideration, and direct a verdict against that party on whom the burden of proof is. State v. Waller, 80 N. C. 401; State v. Patterson, 78 N. C. 470; Sutton v. Madre, 2 Jones, 320; Cobb v. Fogalman, 1 Ire. 440.

In our opinion, therefore, the judge properly held that there was no evidence of the illegal or immoral consideration alleged, and in so doing he committed no error.

No error. Affirmed.[1]

9 Cyc. 516-517 (1-4); W. P. 411 (66); 413 (68).

NEW *v.* WALKER.

108 INDIANA, 365.—1886.

Action on a promissory note. Defense, illegality of consideration. Reply, purchase before maturity, for value, and without knowledge

[1] See also Singleton v. Bremar, Harp. (So. Car.) 201; Given v. Driggs, 1 Caines Rep. (N. Y.) 450; Edwards v. Skirving, 1 Brevard (So. Car.), 548; Swan v. Scott, 11 Sergeant & Rawle (Pa.), 155.

of illegality. Demurrer to reply. Demurrer sustained. Plaintiff appeals.

Defendant gave the note in question for the purchase price of a patent right. By the statute, all sales of patent rights are unlawful when the seller has not filed with the clerk of the court of the county where the sale is made copies of the letters patent, and an affidavit that the letters are genuine, etc., and all obligations given for the purchase price of such patent rights are required to contain the words "given for a patent right." Non-compliance with the statute is made a misdemeanor. The payee of the note in question had not complied with this statute.

ELLIOTT, C. J. . . . In our opinion, a promissory note executed in direct violation of a mandatory statute, is inoperative as between the parties and those who buy with notice. Where a statute, in imperative terms, forbids the performance of an act, no rights can be acquired by persons who violate the statute, nor by those who know that the act on which they ground their claim was done in violation of law. A promissory note, executed in a transaction forbidden by statute, is at least illegal as between the parties and those who have knowledge that the law was violated. It is an elementary rule that what the law prohibits, under a penalty, is illegal, and it cannot, therefore, be the foundation of a right as between the immediate parties. Wilson v. Joseph, 107 Ind. 490; Hedderich v. State, 101 Ind. 571, 51 Am. R. 768; Case v. Johnson, 91 Ind. 477.

This rule also applies to those who assume to purchase from one of the parties to the transaction, but purchase with full knowledge that the law has been transgressed. . . .

Having determined that the promissory note, on which the action is founded, is negotiable as commercial paper, the next question is, what are the rights of the appellant as the *bona fide* holder of the paper? For there can be no doubt under the confessed allegations of the reply that she is such a holder. She is such in the strongest light, for she purchased from a good-faith owner, and is herself free from fault and innocent of wrong. Hereth v. Merchants' Nat. Bank, 34 Ind. 380; Newcome v. Dunham, 27 Ind. 285.

The decisions agree that, where the statute in direct terms declares that a note given in violation of its provisions shall be void, it is so no matter into whose hands it may pass. The rule is thus stated by the court in Vallett v. Parker (6 Wend. 615): "Wherever the statute declares notes void, they are and must be so, in the hands of every holder; but where they are adjudged by the court to be so, for failure or the illegality of the consideration, they are void only in the hands of the original parties, or those who are chargeable with, or have had notice of the consideration."

It is said by a late writer, in stating the same general rule, that,

"when a statute, expressly or by necessary implication, declares the instrument absolutely void, it gathers no vitality by its circulation in respect to the parties executing it." 1 Daniel Negotiable Int. § 197. We regard this author's statement as substantially expressing the general rule, and, accepting it as correct, the pivotal question is whether our statute does expressly, or by necessary implication, declare that notes given to vendors of patent rights who have disobeyed the law shall be void? There is certainly no express declaration in the statute that such notes shall be void, nor do we think that there is any necessary implication that they shall be void. A man may be guilty of a misdemeanor, and yet notes taken by him in the transaction which creates his guilt may not be void in the hands of an innocent holder. A familiar illustration of this principle is afforded by those cases which declare that a note given in consideration of the suppression of a criminal prosecution is inoperative as between the immediate parties, but valid in the hands of a *bona fide* purchaser. This is the settled law, although the compounding of a felony is made a crime by statute. Our opinion is, that a statute making it a crime to take promissory notes in a prohibited transaction does not make the notes void in the hands of innocent purchasers, although the person who violates the statute commits a crime. This conclusion is well sustained by authority. Anderson v. Etter, 102 Ind. 115; Vallett v. Parker, *supra;* Taylor v. Beck, 3 Rand. (Va.) 316; Glenn v. Farmers' Bank, 70 N. C. 191; Smith v. Columbus State Bank, 9 Neb. 31; Haskell v. Jones, 86 Pa. St. 173; Palmer v. Minar, 8 Hun, 342; Cook v. Weirman, 51 Iowa, 561.

A party who executes a promissory note, negotiable as commercial paper, fair on its face and complete in all its parts, puts in circulation an instrument which he knows is the subject of barter and sale in the commercial world, and it is his own fault if he does not put into it the words which will warn others not to buy it in the belief that it will be free from all defenses. The experience of the business world has shown the necessity of affixing to promissory notes the quality of negotiability, and commercial transactions would be seriously disturbed if notes, fair on their face, and containing the required words of negotiability, were not protected in the hands of innocent purchasers. It is, therefore, not the policy of the law to multiply exceptions to the general rules governing notes negotiable by the law merchant, so that in such a case as this it cannot, without an indefensible departure from that policy, be held that the promissory note is not protected in the hands of a good-faith holder.

Nor can such a step be taken without wandering from the course marked and defined by the long-established principle that, where one of two innocent persons must suffer from the act of a third person, he who puts it in the power of the third to do the act must bear

the loss. To our minds it seems clear that this principle rules here, for the man who executes to a vendor of patent rights a promissory note, in full and perfect form, puts it in his power to wrong others by selling the note as an article of commerce.

We regard the reply as unquestionably good, and adjudge that the trial court erred in sustaining the demurrer to it. . . .

Judgment reversed.

7 Cyc. 948 (77-80).

KENNEDY *v.* WELCH.

196 MASSACHUSETTS, 592.—1907.

Bill in equity, to enjoin the defendant from foreclosing a mortgage of real estate given by the plaintiff to him, and to compel him to discharge the mortgage and cancel the note which it secured. The case was referred to a master and was heard on exceptions by the defendant to the master's report by Crosby, J., who overruled the exceptions and denied certain requests of the defendant for rulings, and the defendant excepted.

A firm named Whitlaw and Smith purchased from the defendant a bottling business, and gave the "first note," to cover the purchase price. The plaintiff and others signed the note as makers. The note not being paid at maturity, the defendant brought an action upon it against the plaintiff and others of the makers. The master found that, while that action was pending, the note and mortgage which were the subject of this suit "were given in compromise of the plaintiff's liability on the first note and the action thereon," and that they were "intended to cover what was then due on the first note."

The defendant's fourth request, was as follows: "Unless at the time of sale or prior thereto, this defendant did something, performed some act, to aid and assist Whitlaw and Smith in some unlawful purpose in connection with the property purchased, this $3000 note was perfectly good and this plaintiff was liable and is still liable thereon"; as to which the presiding judge ruled: "The fourth request is given with the following addition: 'But the note was void as against the plaintiff if the defendant at or prior to the sale and as a part of the consideration of the sale for which the note was given agreed that Whitlaw and Smith should have the right to carry on the liquor business under the defendant's fifth class license and that such agreement entered into the contract and was an inducement for said Whitlaw and Smith to make the same.'"

BRALEY, J. . . . The important question upon which the decision depends is whether the second promissory note, secured by a

mortgage of the plaintiff's real estate, the foreclosure of which the bill is brought to enjoin, is valid. By Pub. St. c. 100, § 10, as amended by St. 1891, p. 948, c. 369, in force when the first note was given, a license of the fifth class could not lawfully be transferred by the licensee to a purchaser even with the consent of the license commissioners. St. 1889, p. 1040, c. 344. The privilege conferred is personal, and can be exercised only by the licensee. Com. v. Lavery, 188 Mass. 13, 14, 73 N. E. 884. The master finds that the purchase price, for which this note was given, included the transfer of a license of this class then held by the defendant, for the purpose and with the design on his part of enabling the vendees as a part of the transaction to continue the business of selling intoxicating liquors on the leased premises, where the personal property sold was situated, or with which it was connected. It is evident from these findings, as well as from those under the defendant's fourth request, that the transfer of the license was not only held out as an inducement to make the purchase, but whatever value it had entered into the sale, which was fully executed. The master having further determined, that the valuation placed upon the license was inseparable from the purchase price, the consideration was entire, and the note being tainted with illegality, was absolutely void and unenforceable in the suit brought against the plaintiff, who as between himself and the defendant was a joint maker. Hubbell v. Flint, 13 Gray, 277; Brigham v. Potter, 14 Gray, 522; Bishop v. Palmer, 146 Mass. 469, 16 N. E. 299, 4 Am. St. Rep. 339; Lamb v. McIntyre, 183 Mass. 367, 67 N. E. 320. But if the first note was thus rendered invalid, it is said by the defendant, that the second rests upon a new consideration. The consideration for the mortgage note is expressly found to have been "the release and discharge of the plaintiff from all liability on the original note or in the suit brought thereon." This finding excludes whatever advantage, if any, the defendant might have derived from other possible elements of gain to himself, or of benefit to the plaintiff, disclosed by the report, and the only question is, whether the ruling that the last note became subject to the same infirmity was wrong. It would be a perversion of the explicit statements in the report to hold, that the defendant was ignorant of the purpose of the purchase, in which he participated, and he must be presumed to have known, that at the time the writ in the original claim was sued out, that claim was not well founded, because of his attempt to evade the statute. If under a promise by the plaintiff to pay, the defendant has forborne to sue, the forbearance would not have furnished a sufficient consideration to support the promise. It could not have been upheld by the old obligation, as that was void for illegality; nor by the new, for by the repetition of a void promise

the creditor suffers no detriment, and the promisor receives no benefit. Holden v. Cosgrove, 12 Gray, 216; Howe v. Litchfield, 3 Allen, 443; Palfrey v. Portland, Saco & Portsmouth Railway Co., 4 Allen, 55. See Dunham v. Johnson, 135 Mass. 310.

The defendant, however, insists that, suit having been brought, its discontinuance at the plaintiff's request furnished an independent consideration. Barlow v. Ocean Ins. Co. 4 Metc. 270; Dunbar v. Dunbar, 180 Mass. 170, 62 N. E. 248, 94 Am. St. Rep. 623. But there is a clear distinction between the adjustment of a pending suit to enforce a liability the outcome of which may be reasonably doubtful, and a suit brought upon an illegal demand, which the courts will not lend their aid to enforce. See White v. Buss, 3 Cush. 448; Cardoze v. Swift, 113 Mass. 250; Scollans v. Flynn, 120 Mass. 271. In the first instance, the consideration, which may be and often is inadequate, is supported by the compromise, even if the original claim upon trial might have been found invalid. Prout v. Pittsfield Fire District, 154 Mass. 450, 453, 28 N. E. 679, and cases cited; Miles v. New Zealand, Alford Estate Co., 32 Ch. Div. 266, 283, 284. In the second instance, there is no existing claim which the law will recognize as sufficient to raise a doubt in favor of the creditor, and the essential basis for a settlement is absent. Murphy v. Rogers, 151 Mass. 118, 24 N. E. 35; Bride v. Clark, 161 Mass. 130, 36 N. E. 745; Pitkin v. Noyes, 48 N. H. 294, 97 Am. Dec. 615, 2 Am. Rep. 218; Feeter v. Webber, 78 N. Y. 334. Besides, if it were held that the discontinuance of the suit was enough to furnish a distinct and separate benefit, the consideration was indivisible, and as that which is unlawful cannot be separated, or apportioned, the whole fails. Loomis v. Newhall, 15 Pick. 159; Perkins v. Cummings, 2 Gray, 258; Bishop v. Palmer, 146 Mass. 469, 474, 16 N. E. 299, 4 Am. St. Rep. 339. Whichever way is taken, the illegal element which avoided the first note having entered also into the mortgage note, the plaintiff cannot be held to the performance of his promise.

We are asked by the defendant, if this conclusion is reached, to consider and adjust between the parties, the measure and extent of the relief to be granted. But no error of law being found either in the refusals to rule as requested, or in the rulings given, the order must be,

Exceptions overruled.

9 Cyc. 563 (11-12); W. P. 491 (51).

(*iv.*) *Can a man be relieved from a contract which he knew to be unlawful?*

BERNARD *v.* TAYLOR.

23 OREGON, 416.—1893.

LORD, C. J. This was an action to recover the sum of five hundred and sixty dollars deposited with the defendant as a wager on the result of a foot race. The case was tried without the intervention of a jury, and the material facts as found by the court are: That the plaintiff deposited with the defendant the sum of five hundred and sixty dollars in gold for the benefit of one George Grant, and as a wager upon a foot race which said Grant and one Anderson were to run the next day at a place agreed upon; that at the time the said money was so deposited, it was understood by Grant and the defendant Taylor and the plaintiff that the money should be paid back to the plaintiff on his demand for the same at any time before the race should be run, which the defendant agreed to do; that before such race was run the plaintiff on two occasions demanded said money of the defendant, who refused to pay it back, but pretends that said race was run, and that Anderson was the winner, to whom he paid the money before the commencement of this action; that the race agreed to be run was not run, but that Grant, at the appointed time, refused to run, and Anderson ran over the course alone and was declared by the defendant to be the winner; that said pretended race was never intended to be a fair and honest race, and that plaintiff knew at the time he deposited his money with the defendant that the race was to be a "bogus race"; that the parties engaged in getting it up, namely, Grant, Anderson, and the defendant, wanted to "rope in" somebody; that it was understood that Grant was to win the race; that the plaintiff furnished the money and deposited it with the defendant as stakeholder for the benefit of Grant, in whom he had confidence at the time, but of whom, before the time appointed for the race to come off, he became suspicious; that he feared that he would lose the money, and thereupon, by reason of such suspicion, and by virtue of the agreement with the defendant, demanded of the defendant the return of said money, and that said Grant then and there, before the time of running the race had arrived, demanded of the defendant the repayment of the money to the plaintiff, etc. Substantially upon such findings, the court found as a conclusion of law that the plaintiff was entitled to judgment for the sum of five hundred and sixty dollars and interest, and for costs, etc. From this judgment the appeal has been brought to this court.

1. The first contention for the defendant is, that wagers or

wagering contracts upon indifferent subjects are valid in this State by force of the common law, except when prohibited by statute. . . . Wagers are inconsistent with the established interests of society, and in conflict with morals of the age, and as such they are void as against public policy. In view of these considerations, we do not think that such transactions, though upon indifferent subjects, are valid in this State.

2. The next contention for the defendant is, that the alleged agreement was corrupt, illegal, and criminal in this, that it was in advance "fixed" that one of the parties should win, and that certain persons should lose their money; in other words, that the agreement had in contemplation "a job race." This, it is claimed, put the plaintiff *in pari delicto* with the defendant, and as a consequence he is entitled to the benefit of the rule *potior est conditio possidentis.* The general rule is, that the law will not interfere in favor of either party *in pari delicto,* but will leave them in the condition in which they are found, from motives of public policy. There is no doubt, where money has been paid on an illegal contract which has been executed, and both parties are *in pari delicto,* the courts will not compel the return of the money so paid. But the cases show that an important distinction is made between executory and executed illegal contracts. While the contract is executory, the law will neither enforce it nor award damages, but the party paying the money, or putting up the property, may rescind the contract and recover back his money. If the contract is already executed, nothing paid or delivered can be recovered back. This arises out of a distinction between an action in affirmance of an illegal contract and one in disaffirmance of it. In the former such an action cannot be maintained, but in the latter, an action may be maintained for money had and received. The reason is, that the plaintiff's claim is not to enforce, but to repudiate, an illegal agreement. Wharton, Con. 354. In such case there is a *locus pœnitentiæ;* the wrong is not consummated, and the contract may be rescinded by either party.

In Edgar v. Fowler (3 East, 225,) Lord Ellenborough said: "In illegal transactions the money has always been stopped while it is *in transitu* to the person entitled to receive it." As Lord Justice Mellish said: "To hold that the plaintiff is entitled to recover does not carry out the illegal transaction, but the effect is to put everybody in the same situation as they were before the illegal transaction was determined upon, and before the parties took any steps. If money is paid or goods delivered for an illegal purpose, the person who has so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action; the law will not allow that

to be done." Taylor v. Bowers, 1 Q. B. Div. 291. In Hastelow v. Jackson (8 Barn. & Cress. 221), which was an action by one of the parties to a wager on the event of a boxing match, commenced against the stakeholder after the battle had been fought, Littledale, J., said: "If two persons enter into an illegal contract and money is paid upon it by one to the other, that may be recovered back before the execution of the contract, but not afterwards." Smith v. Bickmore, 4 Taunt. 474; Tappenden v. Randall, 2 Bos. & Pul. 467; Lowry v. Bourdien, 2 Doug. 468; Munt v. Stokes, 4 T. R. 561; Utica Ins. Co. v. Kip, 8 Cow. 20; Merritt v. Millard, 4 Keys (N. Y.), 208; White v. Franklin Bank, 22 Pick. 181; O'Bryan v. Fitzpatrick, 48 Ark. 490. "And this rule," says Mr. Justice Woods, "is applied in the great majority of the cases, even when the parties to an illegal contract are *in pari delicto*, because the question which of two parties is the more blamable is often difficult of solution, and quite immaterial." Spring Co. v. Knowlton, 103 U. S. 60. The object of the law is to protect the public, and not the parties. This is upon the principle that it best comports with public policy to arrest the illegal transaction before it is consummated. Stacy v. Foss, 19 Me. 335 (36 Am. Dec. 755).

3. It only remains to apply these principles to the facts. These show that the plaintiff was cognizant that the race had been fixed in advance—that one of the parties should win, and that certain other persons should lose their money—that it was a bogus race, and the arrangement based upon it corrupt, and designed to cheat and defraud the other parties; but, at the same time, they show that he repented and repudiated the transaction before it was consummated, by demanding the return of his money the evening of the day before the race, and on the day of the race, but before it was to come off, and that the defendant refused to pay it back, and that he afterwards forbade the defendant to pay said money to any other person than himself. He availed himself of the opportunity which the law affords a person to withdraw from the illegal contract before it has been executed; he repented before the meditated wrong was consummated, and twice demanded to withdraw his money, and thereby rescinded the contract. To allow the plaintiff to recover does not aid or carry out the corrupt and illegal transaction, but the effect is to put the parties in the same condition as they were before it was determined upon. By allowing the party to withdraw, the contemplated wrong is arrested, and not consummated. This the law encourages, and no obstacle should be thrown in the way of his repentance. Hence, if the plaintiff retreated before the bet had been decided, his money ought to have been returned to him, and in default of this he is entitled to recover.

There was no error, and the judgment must be affirmed.

9 Cyc. 551 (60); W. P. 501 (64).

(*v.*) *Conflict of laws.*

UNION NATIONAL BANK *v.* CHAPMAN *et al.*

169 NEW YORK, 538.—1902.

HAIGHT, J. This action was brought upon a promissory note made at Tuscumbia in the State of Alabama, by the defendants, Chapman, Reynolds & Co., a copartnership engaged in business at that place, in the building of a lock in the Tennessee river for the government of the United States, of which note the following is a copy:

"$5,000. Tuscumbia, Alabama, May 1st, 1894. Six months after date, we promise to pay to the order of E. P. Reynolds, Jr., five thousand and no 100ths dollars, value received, with interest at eight per cent per annum from date, payable at Union National Bank, Chicago, Illinois. Chapman, Reynolds & Co. W. P. Chapman. Elizabeth J. Chapman. Ella Howard. C. W. Howard."

The trial court has found as facts that the defendant Elizabeth J. Chapman was the wife of William P. Chapman, who was a member of the firm; that she signed the note at the request of her husband as surety for the firm, and that, while it was the intention of the firm that the note should be negotiated and discounted in the State of Illinois, she did not know of such intention, except from what appeared on the face of the note; that she signed the note for the purpose of raising money for the firm, to enable it to continue its work upon the government contract in Alabama, and after the note was executed it was delivered to Reynolds, the payee therein named, who took it to the plaintiff's bank, in Chicago, Ill., indorsed it, and delivered it to the bank for the purpose of securing loans already made to the firm, and for the purpose of procuring additional loans.

The defense interposed by the defendant Elizabeth J. Chapman was that she had no capacity to make the contract in question, under section 2349 of the Code of 1886 of the State of Alabama, which provides that "the wife shall not, directly or indirectly, become surety for her husband," and it was therefore invalid and of no binding force against her. On behalf of the plaintiff it is contended that the note had no legal inception until it was discounted by the plaintiff's bank in Illinois, and that it then became a valid contract of that State, and under its laws the wife was not disqualified from becoming surety for her husband. The question thus presented is as to whether this was an Alabama or an Illinois contract.

As we have seen, the note was drawn, signed, and delivered to the payee at Tuscumbia, Ala., and Mrs. Chapman signed as surety for her husband. She did not authorize it to be discounted in Illinois, or know that the members of the firm intended to have it

negotiated there. She only knew that it was payable at the plaintiff's bank, in that State. It is true, the note did not have a valid inception, in such a sense as to create a liability on the part of the makers, until it was discounted and passed over to the bank; but this does not necessarily make it an Illinois contract, so far as the surety is concerned. Mrs. Chapman's contract to become surety was complete when the instrument was signed and delivered to the payee. It was then a contract beyond her recall, upon which she in the future might become liable when negotiated by the payee, if otherwise valid, and the place of the negotiation could not, under the circumstances, in any manner change the force or effect of her contract. One of the essential elements of the contract is the meeting of the minds of the contracting parties upon the matter which is the subject of the contract. In this contract Mrs. Chapman agreed with the payee of the note that she would become surety for her husband to the amount thereof, and this agreement was made in the State of Alabama. She did not agree that it should be negotiated in Illinois and made an Illinois contract. Her mind did not meet the intention of the payee upon that subject, and she cannot, therefore, be held to have agreed that it should become a contract of that State. She knew by the terms of the instrument that it was payable at the plaintiff's bank, but this did not advise her that it was intended to discount it there, or to constitute it a contract of that State. It appears from the evidence that the firm kept its accounts with, and made its deposits in the plaintiff's bank, and she might well have assumed that it was made payable there for the convenience of the firm.

We have had occasion to examine many cases bearing upon the question under consideration. It may not be profitable to here indulge in an extended discussion of the authorities, for we have found none that are exactly in point. We shall therefore extract from them some general principles which appear to be settled beyond controversy, and apply them to the question under consideration: (1) All matters bearing upon the execution, the interpretation, and the validity of contracts, including the capacity of the parties to contract, are determined by the law of the place where the contract is made; (2) all matters connected with its performance, including presentation, notice, demand, etc., are regulated by the law of the place where the contract, by its terms, is to be performed; (3) all matters respecting the remedy to be pursued, including the bringing of suits and the service of process, depend upon the law of the place where the action is brought.

In the case of Scudder v. Bank, 91 U. S. 406, 23 L. Ed. 245, a bill of exchange was drawn by a party in Chicago upon a firm in St. Louis, and verbally accepted by a member of the St. Louis firm, then present in Chicago. Under the law of Missouri, acceptances

were required to be in writing, but under the law of Illinois a parol acceptance was valid. The bill of exchange, as we have seen, was drawn in Chicago, Ill., and therefore all matters pertaining to its execution, interpretation, and validity had to be determined by the laws of that State. It was made payable in St. Louis, Mo., and ordinarily the laws of that State would control with reference to acceptance and performance; but a member of the firm in that State was present in Chicago, and he there accepted the bill of exchange, without waiting for it to be sent on to St. Louis, to his firm in that city. It was therefore held to be an Illinois acceptance. In the case of Voigt v. Brown, 42 Hun, 394, the husband and wife resided in the State of New York. The wife here authorized her husband to sign her name to an accommodation note. He then went into Connecticut, and there executed a note payable to the order of the firm of which he was a partner, and signed her name thereto. He then took the note to New York, and had it discounted by the plaintiffs, and received the money. Under the laws of Connecticut, a married woman could not contract, except for the benefit of herself, her family, or her separate or joint estate. Under the laws of New York, her contract was valid. It was held to be a New York contract. The learned Appellate Division cites this case as supporting their contention, but to our minds it widely differs from that which we have under consideration. In that case the wife, as we have seen, resided in this State, and remained in this State. The authority of her husband to sign her name to the note was given here. When he, therefore, as her agent, drew the note and signed her name thereto, he acted upon authority derived in this State, and the paper became of the same force and effect as if the wife had actually signed it here. It was taken to the city of New York, and there negotiated. We thus have it drawn as a New York contract, and negotiated as a New York contract, and it evidently was so understood by the parties.

In the case of Milliken v. Pratt, 125 Mass. 374, 28 Am. Rep. 241, a wife guaranteed the payment by her husband of $500 to one Pratt of Portland, Me. The guaranty was in writing, and was dated at Portland, January 29, 1870. She, however, actually signed the paper in Massachusetts, but she sent it to Pratt at Portland, and caused it to be delivered to him there. Acting upon it, he delivered goods to her husband which he then purchased. The guaranty was valid under the laws of Maine, but void under the laws of Massachusetts. It was held that the contract was governed by the laws of Maine. In this case it will be observed that the guaranty not only purports to have been executed in Maine, but that the wife caused the instrument to be sent to Maine, and there delivered to the plaintiff. She therefore knew and understood that the contract

was to have its inception there, and consequently must have intended it to be controlled by the laws of that State. In line with this is the recent case of Grand v. Livingston, 4 App. Div. 589, 38 N. Y. Supp. 490, affirmed in this court (158 N. Y. 688, 53 N. E. 1125), in which it was expressly held that the contract must be construed and determined under the law of the State where it was executed, unless it could fairly be said that the parties at the time of its execution clearly manifested an intention that it should be governed by the laws of another State.

Applying these principles to the question under consideration, it seems clear that the capacity of Mrs. Chapman to contract must be determined by the law of the State where the contract was executed, unless it can fairly be said that she, at the time of the execution of the instrument, clearly understood and intended that it should be governed by the laws of another State. Such an intention or understanding is not manifest in this case. Instead thereof, it is found that she did not know where the paper was to be discounted.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

VANN, J. (dissenting). The contract of a surety rests upon the contract of the principal, and until the latter becomes operative the former is not binding. The promise of the surety has nothing to act upon until the promise of the principal is in force as an effective contract. When the firm negotiated the paper in Illinois, as they had a right to do, by selling it to a *bona fide* purchaser for value, that which theretofore had been merely a note in form first became a note in fact. It then became a contract, and for the first time acquired the quality of commercial paper. Until then the law did not recognize Mrs. Chapman as a surety. She had made no enforceable contract, but merely an inchoate promise, which was without legal life until what was done in Alabama with implied authority to complete it elsewhere ripened into a lawful obligation by what was done in Illinois. All that was done in Alabama did not make a contract, and therefore the contract was not made in that State. It was made in Illinois, because there was no contract, either of principal or surety, until the paper was used in that State. . . .

Parker, C. J., and Gray, O'Brien, and Martin, JJ., concur with Haight, J. Bartlett, J., concurs with Vann, J.

Judgment reversed, etc.

9 Cyc. 671 (23); 666-667 (8-10); 669-670 (12-14); 690-691 (31-34). Beale, What law governs the validity of a contract, 23 H. L. R. 1, 79, 194, 260.

PART II.

THE OPERATION OF CONTRACT.

CHAPTER I.

The Limits of the Contractual Obligation.

A man cannot incur liabilities from a contract to which he was not a party.

Brannon, J., in CRUMLISH'S ADM'R *v.* CENTRAL IMPROVEMENT CO. *et al.*

38 WEST VIRGINIA, 390.—1893.

This payment was made by a stranger, without request or ratification by the debtor, so far as appears. Does it satisfy the judgment? As it seems to me, the answer depends upon whether you mean as to the creditor or debtor. It remains a correct legal proposition to the present, that one man, who is under no obligation to pay the debt of another, cannot without his request officiously pay that other's debt, and charge him with it. If the debtor ratify such payment, the debt is discharged, and he becomes liable to the stranger for money paid to his use. If he refuse to ratify it, he disclaims the payment, and the debt stands unpaid as to him. In the one case, the stranger would at law sue the debtor for money paid to his use; in the other, enforce the debt in the creditor's name for his use. If his payment is not ratified, he may go into equity praying that, if the debtor ratify it, said debtor may be decreed to repay him, or, if the debtor do not ratify the payment, that the debt be treated as unpaid as between him and the debtor, and that it be enforced in his favor as an equitable assignee. Neely v. Jones, 16 W. Va. 625; Moore v. Ligon, 22 W. Va. 292; Beard v. Arbuckle, 19 W. Va. 135.

But how as to the creditor? When a stranger pays him the debt of a third party without the request of such third party, as in this case, can the creditor say the debt is yet unpaid, and enforce it against the debtor, as is attempted to be done by Jamison & Co?

Can he accept such payment and say, because it was made by a stranger, it is no payment? Is his acceptance not an estoppel by conduct *in pais,* as to him?

There has been a difference of opinion in this matter. The old English case of Grymes v. Blofield (Cro. Eliz. 541), decided in Elizabeth's reign, is the parent of the cases holding that even the creditor accepting payment from a stranger may repudiate, and still enforce his demand as unpaid. That case is said to have decided that a plea of accord and satisfaction by a stranger is not good, while Rolle Abr. 471 (condition F.) says it was decided just the other way. Denman, C. J., questioned its authority in Thurman v. Wild (11 A. & E. 453, 39 E. C. L. 145). Opposite holding has been made in England in Hawkshaw v. Rawlings (1 Strange, 24). Its authority is questioned at the close of the opinion by Cresswell, J., in Jones v. Broadhurst (9 M. G. & S., C. B., 173, 67 E. C. L. 172), as contrary to an ancient decision in 36 Hen. VI., and against reason and justice. Parke, B., seemed to think it law in Simpson v. Eggington (10 Exch. 845). It was followed in Edgcombe v. Rodd (5 East, 294) and Stark v. Thompson (3 T. B. Mon. 296). Lord Coke held the satisfaction good. Co. Litt. 206 b, 207 a. See 5 Rob. Pr. (New) 884; 7 Rob. Pr. (New) 548. The cases of Goodwin v. Cremer (18 A. & E., N. S. 757, 83 E. C. L. 757), and Kemp v. Balls (10 Exch. 607, 28 Eng. Law & Eq. 498), seem to hold that payment must be made by a third person as agent for, and on account of, debtor, with his assent or ratification. In New York old cases held this doctrine. Clow v. Borst, 6 Johns. 37; Bleakley v. White, 4 Paige, 654. But later, in Wellington v. Kelly (84 N. Y. 543), Andrews, J., said that the old cases were doubtful, but had not been overruled, but it was not necessary in that case to say whether it should longer be regarded as law, and the syllabus makes a *quære* on that point. It was held in Harrison v. Hicks (1 Port. Ala. 423), that "payment of a debt, though made by one not a party to the contract, and though the assent of the debtor to the payment does not appear, is still the extinguishment of the demand." The opinion says that, as between the person paying and him for whose benefit it was paid, a question might arise whether it was voluntary, which would depend on circumstances of previous request or subsequent [assent], express or implied. This doctrine is sustained by Martin v. Quinn, 37 Cal. 55; Gray v. Herman, 75 Wis. 453 (44 N. W. Rep. 248); Cain v. Bryant, 12 Heisk. 45; Leavitt v. Morrow, 6 Ohio St. 71; Webster v. Wyser, 1 Stew. (Ala.) 184; Harvey v. Tama Co., 53 Ia. 228 (5 N. W. Rep. 130). Bish. Cont. § 211 holds that, if payment "be accepted by creditor in discharge of debt, it has that effect." See 2 Whart. Cont. § 1008.

It seems utterly unjust and repugnant to reason, that a creditor accepting payment from a stranger of the third person's debt should

be allowed to maintain an action against the debtor pleading and thereby ratifying such payment, on the technical theory that he is a stranger to the contract. The creditor has himself for this purpose allowed him to make himself a *quasi* party, and consents to treat him so, so far as payment is concerned. To regard the debt paid, so far as he is concerned, is but to hold him to the result of his own act. Shall he collect the debt again? In that case can the stranger recover back? What matters it to the creditor who pays? As the Supreme Courts of Wisconsin and Ohio, in cases above cited said, this doctrine is against common sense and justice. It does not at all infringe the rule that one cannot at law make another his debtor without request, to allow such payment to satisfy the debt as to the creditor; and this court, while recognizing the rule that one cannot officiously pay the debt of another and sue him at law, unless he has ratified it, by allowing the stranger to go into equity and get repayment, makes the payment in the eyes of a court of equity operate to satisfy the creditor, and render the stranger a creditor of the debtor. Neely v. Jones, 16 W. Va. 625. I know that in that case it is held that, "if a payment by a stranger is neither ratified or authorized by the debtor, it will not be held to be a discharge of the debt"; but, though this point is general, that was a case of the stranger seeking to make the debtor repay, and the case and opinion intended to lay down the rule at law only as between the stranger paying and the debtor, not as between the creditor and debtor. . . .[1]

9 Cyc. 386 (31); 7 H. L. R. 437.

[1] In Moody v. Moody, 14 Me. 307, the court said: "To maintain this action there must be a contract between the parties either expressed or implied. The evidence reported does not prove any express contract; and the only evidence from which one can be implied in law is, that the defendant was bound for the support of one Jones; that he neglected and refused to afford him such support; and that Jones applied to the plaintiff to board him, and the plaintiff did board him with the knowledge of the defendant. The defendant's neglect to fulfill his contract with Jones did not authorize another person to assume the performance of it, and substitute himself as the creditor of the defendant. The law never implies a contract to substitute one creditor for another. The defendant has a right to say, '*Non in haec foedera veni.*'" But see Forsyth v. Ganson, 5 Wend. (N. Y.) 558, where there were circumstances of family relationship.

Can a man acquire rights under a contract to which he is not a party? Promise for benefit of third party.

BORDEN *et al v.* BOARDMAN.

157 MASSACHUSETTS, 410.—1892.

Contract. C. contracted to build a house for defendant. When the time for the first payment came defendant requested C. to have present all persons having claims against the house. Plaintiffs had a claim for $150, but were not present, and at C.'s request defendant reserved from the amount due C. $200 out of which he promised to pay plaintiffs' claim. Plaintiffs subsequently asked defendant about the arrangement, and defendant said he held the money under the above agreement with C., but had been advised not to pay it at present. Defendant claimed that, upon the evidence, plaintiffs were not entitled to recover, and offered to show that a day or so after the above settlement C. had abandoned the contract, and that when plaintiffs inquired about the arrangement defendant informed them that C. had broken his contract, and that defendant was damaged thereby. This evidence was excluded and a verdict directed for plaintiffs. If the ruling was right, the judgment was to be entered on the verdict; otherwise, judgment for defendant.

MORTON, J. The evidence offered in bar was rightly excluded. The subsequent failure of Collins to perform his contract would not release the defendant from the obligation, if any, which he had assumed to the plaintiffs, in the absence of any agreement, express or implied, that the money was to be paid to the plaintiffs only in case Collins fulfilled his contract. Cook v. Wolfendale, 105 Mass. 401. There was no evidence of such an agreement.

The other question is more difficult. The case does not present a question of novation; for there was no agreement among the plaintiffs, Collins, and the defendant that the defendant should pay to the plaintiffs, out of the money in his hands and due to Collins, a specific sum, and that thenceforward the defendant should be released from all liability for it to Collins, and should be liable for it to the plaintiffs. Neither was there any agreement between the plaintiffs and the defendant that the latter would pay the money to them. The conversation between one of the plaintiffs and the defendant cannot be construed as affording evidence of such an agreement. Coupled with the defendant's admission that he was holding money for the plaintiffs was his repudiation of any liability to the plaintiffs for it. Neither can it be claimed that there was an equitable assignment of the amount in suit from Collins to the plaintiffs. There was no order or transfer given by him to them; nor was any notice of the arrangement

between him and the defendant given by him to the plaintiffs. Lazarus v. Swan, 147 Mass. 330. The case upon this branch, therefore, reduced to its simplest form, is one of an agreement between two parties, upon sufficient consideration it may be between them, that one will pay, out of funds in his hand belonging to the other, a specific sum to a third person, who is not a party to the agreement, and from whom no consideration moves. It is well settled in this State that no action lies in such a case in favor of such third party to recover the money so held of the party holding it. Exchange Bank v. Rice, 107 Mass. 37, and cases cited; Rogers v. Union Stone Co., 130 Mass. 581; New England Dredging Co. v. Rockport Granite Co., 149 Mass. 381; Marston v. Bigelow, 150 Mass. 45; Saunders v. Saunders, 154 Mass. 337. Certain exceptions which were supposed to exist have either been shown not to exist, or have been confined within narrower limits. Exchange Bank v. Rice, and Marston v. Bigelow, *ubi supra.*

We have assumed that the sum which the defendant agreed with Collins to pay the plaintiffs was specific. But it is to be observed that the agreement between the plaintiffs and Collins was that it should not cost more than one hundred and fifty dollars to put the building back. Collins told the defendant that the sum was due to the plaintiffs. The defendant reserved two hundred dollars. It may well be doubted, therefore, whether the defendant had in his hands a specific sum to be paid to the plaintiffs, or whether he agreed with Collins to hold and pay the plaintiffs a specific sum. If the sum was not specific, the plaintiffs do not claim, as we understand them, that they can recover.

Judgment for the defendant.[1]

9 Cyc. 375 (92-93); 377 (6); W. P. 256 (86); 259-260 (87-96).

WILLIAMS, J., IN ADAMS *v.* KUEHN.

119 PENNSYLVANIA STATE, 76.—1887.

Where one person enters into a contract with another to pay money to a third, or to deliver some valuable thing, and such third party is the only party interested in the payment or the delivery, he can release the promisor from performance or compel performance by

[1] Accord: Pipp v. Reynolds, 20 Mich. 88; Halsted v. Francis, 31 Mich. 113; Linneman v. Moross, 98 Mich. 178; Chamberlain v. Ins. Co., 55 N. H. 249 (semble).

"In all the cases since Tweddle v. Atkinson (1 B. & S. 393), in which a person not a party to a contract has brought an action to recover some benefit stipulated for him in it, he has been driven, in order to avoid being shipwrecked upon the common law rule which confines such an action to parties and privies, to seek refuge under the shelter of an alleged trust in his favor." —Street, J., in Faulkner v. Faulkner, 23 Ont. Rep. 252, 258.

suit. If, on the other hand, a debt already exists from one person to another, a promise by a third person to pay such debt is for the benefit of the original debtor to whom it is made, and can only be released or enforced by him. If it could also be enforced by the original creditor the promisor would be liable to two actions for the same debt at the same time and upon the same contract. Among the exceptions are cases where the promise to pay the debt of a third person rests upon the fact that money or property is placed in the hands of the promisor for that particular purpose. Also where one buys out the stock of a tradesman and undertakes to take the place, fill the contracts, and pay the debts of his vendor. These cases as well as the case of one who receives money or property on the promise to pay or deliver to a third person, are cases in which the third person, although not a party to the contract, may be fairly said to be a party to the consideration on which it rests. In good conscience the title to the money or thing which is the consideration of the promise passes to the beneficiary, and the promisor is turned in effect into a trustee. But when the promise is made to, and in relief of one to whom the promise is made, upon a consideration moving from him, no particular fund or means of payment being placed in the hands of the promisor out of which the payment is to be made, there is no trust arising in the promisor and no title passing to the third person. The beneficiary is not the original creditor who is a stranger to the contract and the consideration, but the original debtor who is a party to both, and the right of action is in him alone.

LEHOW *v.* SIMONTON *et al.*

3 COLORADO, 346.—1877.

Assumpsit. Plea of set-off. A demurrer to the plea was sustained.

The plea set forth that the plaintiff, Pierce, had purchased the interest of one Phifer in the business of Simonton & Phifer, and had agreed to assume one-half of the indebtedness of the firm jointly with the plaintiff, Simonton; that Simonton & Phifer were then indebted to defendant in the sum of $2000; and that Pierce jointly with Simonton, plaintiffs herein, undertook and agreed with the old firm to pay this amount to defendant.

WELLS, J. 1. Whatever may be the general rule in the case of a plea, it is certain that the declaration in counting upon a promise good in parol by the common law need not show a compliance with the requisites of the statute of frauds. The statute prescribes a rule of evidence, and not a rule of pleading. Steph. Pl. 313, 374; Browne on Stat. of Frauds, § 505; 1 Chit. Pl. (16th Am. ed.) 245. Now the plea of set-off is in the nature of a declaration, and in respect to the decree

of certainty required, is governed by the same rule. Waterman on Set-off, § 646. The question, whether the undertaking mentioned in the plea is within the statute of frauds, does not arise.

2. It seems to be the settled doctrine of the courts of England at this day, that a stranger to the consideration cannot enforce the contract by an action thereon in his own name, though he be avowedly the party intended to be benefited. 1 Chit. on Cont. (11th Am. ed.) 74. In this country there are many cases which assert the same rule. Salmon v. Brown, 6 Blackf. 347; Britzell v. Fryberger, 2 Cart. 176; Clapp v. Lawton, 31 Conn. 103; Conklin v. Smith, 7 Ind. 108; Mellen v. Whipple, 1 Gray, 321; Robertson v. Reed, 47 Penn. St. 115; Exchange Bank v. Price, 107 Mass. 42; Warren v. Bachelder, 15 N. H. 139; McLaren v. Hutchison, 18 Cal. 81, and some others which are not accessible to us.

But as respects simple contracts, the decided preponderance of American authority sustains the action of the beneficiary. 1 Pars. on Cont. 467; 1 Chit. Pl. (16th Am. ed.) 5 n. (n. 1); 2 Greenl. Ev. 109; Thorp v. The Keokuk Coal Co., 48 N. Y. 253; McDowell v. Laev, 35 Wis. 175; Bowhannan v. Pope, 42 Me. 93; Joslin v. N. J. Car Spring Co., 36 N. J. L. 141; Myer v. Lowell, 44 Mo. 328; Sanders v. Clason, 13 Minn. 379; Thompson v. Gordon, 3 Strobh. (S. C.) 196; Scott's Adm'r v. Gill, 19 Iowa, 187; Allen v. Thomas, 3 Metc. (Ky.) 198; Draugham v. Bunting, 9 Ired. 10; Hendrick v. Lindsay, 3 Otto, 143; Beasley v. Webster, 64 Ill. 458; *In re* Rice, 9 Bankr. Reg. 375; Bagaley v. Waters, 7 Ohio St. 369, and many others in the reports of the same courts, are to this effect. To harmonize the decisions is impossible. The doctrine of those last quoted, while confessedly an anomaly, seems to us the more convenient. It accords the remedy to the party who in most instances is chiefly interested to enforce the promise, and avoids multiplicity of actions. That it should occasion injustice to either party seems to us impossible.

3. The plea fails to show to whom the promises relied upon were made; but this is equivalent to stating promise to the party from whom the consideration proceeded. 1 Chit. Pl. (16th ed.) 309 (k.); and according to Delaware and Hudson Canal Co. v. Westchester Bank (4 Denio, 97), this is the proper form of the averment.

Judgment reversed with costs, and cause remanded. Reversed.

9 Cyc. 378 (7); 25 L. R. A. 257; W. P. 256 (86); Williston, Contracts for the benefit of a third person, 15 H. L. R. 767.

WOOD *et al. v.* MORIARTY.

15 RHODE ISLAND, 518.—1887.

Plaintiffs' petition for a new trial.

DURFEE, C. J. This is assumpsit for the price of lumber furnished to one Joshua W. Tibbetts for use in the erection of two houses for the defendant, Tibbetts having entered into a written contract with the defendant to build the houses before the lumber was furnished. Tibbetts, after going on for a while in the execution of the contract, released or assigned it to the defendant by an instrument under seal. The instrument begins by reciting the existence of the contract, and proceeds as follows, to wit:

"Now know ye that, for good and sufficient reason, and in consideration of the sum of twenty-five dollars paid to me this day by said Moriarty, I hereby transfer and assign said contract back to said Thomas Moriarty, he agreeing to relieve me from further obligation under it, and I hereby releasing him from all claims or demands of whatsoever kind I may have or have had up to this day, August 26, 1885, against said Moriarty; I hereby acknowledging full payment for said claims and demands, and this shall be his receipt in full for the same to date, meaning hereby to convey to the said Moriarty all my right, title, and interest into and under said contract, desiring to relieve myself from completing the work under the contract, and hereby agree to withdraw from said work on said houses, and leave them to his sole charge and care."

At the trial, testimony was introduced or offered to prove the purchase of the lumber; the execution of the release or assignment; that the defendant, besides paying the consideration recited therein, agreed, by way of further consideration, to pay all bills incurred by Tibbetts on account of the contract released; that among these bills was the bill of the plaintiffs for lumber; and that notice of the arrangement between Tibbetts and the defendant was given by Tibbetts to the plaintiffs. The testimony as to the agreement to pay the bills incurred by Tibbetts was allowed to go in *de bene esse,* and at the close of the testimony for the plaintiffs the court directed a nonsuit. The plaintiffs petitioned for a new trial.

The questions are, whether the plaintiffs were entitled to prove by oral testimony that the defendant agreed to pay the bills incurred by Tibbetts under his contract, by way of further consideration for the release or assignment, and if so, whether, upon proof thereof, the plaintiffs could maintain their action.

The general rule is, that parol evidence is inadmissible to contradict, add to, subtract from, or vary the terms of any written instrument. But when the instrument is a deed, it is held to be no infringement of the rule to permit a party to prove some other consideration than that which is expressed, provided it be consistent

with that which is expressed, and do not alter the effect of the instrument. 1 Greenleaf on Evidence, § 304. In Miller v. Goodwin (8 Gray, 542) it was held that an agreement under seal by a man with a woman who afterwards became his wife, to convey certain real estate to her in consideration of past services, could be supplemented by parol proof that the agreement was for the further consideration of marriage between the parties. See also Villers v. Beaumont, 2 Dyer, 146 a; 2 Phillips on Evidence, 655. In McCrea v. Purmort (16 Wend. 460) the consideration of a deed conveying land was expressed to be money paid, and it was held that parol evidence was admissible to show that the real consideration was iron of a specific quantity, valued at a stipulated price. Murray v. Smith, 1 Duer, 412; Jordan v. White, 20 Minn. 91; Tyler v. Carlton, 7 Me. 175; Nickerson v. Saunders, 36 Me. 413; National Exchange Bank v. Watson, 13 R. I. 91; 2 Phillips on Evidence, 655; Cowen & Hill's Notes, No. 490. We think the nonsuit is not sustainable on this ground.

The defendant contends that the agreement was within the statute of frauds, being an agreement not in writing to answer for the debt of another. But an agreement to answer for the debt of another, to come within the statute of frauds, must be an agreement with the creditor. A promise by A to B to pay a debt due from B to C is not within the statute of frauds. Eastwood v. Kenyon, 11 A. & E. 438; Browne on the Statute of Frauds, § 188. The contract here, as made between Tibbetts and the defendant, was certainly not within the statute.

The question, therefore, takes this form, namely, whether the plaintiffs are entitled to take advantage of the contract and bring suit upon or under it, and if so, whether to such suit the statute is not a good defense. Some of the cases cited for the plaintiffs cover both these points completely. Barker v. Bucklin, 2 Denio, 45; Johnson v. Knapp, 36 Iowa, 616; Barker v. Bradley, 42 N. Y. 316, 1 Am. Rep. 521; Beasley v. Webster, 64 Ill. 458; Jordan v. White, 20 Minn. 91; Joslin v. New Jersey Car Spring Co., 36 N. J. Law, 141; Townsend v. Long, 77 Pa. St. 143, 146. Similar citations might be multiplied if we cared to load our opinion with them. See Browne on the Statute of Frauds, §§ 166 a, 166 b, and notes. On the other hand, the cases are numerous which hold that such an action is not maintainable for want of privity between the parties. Mr. Browne, in § 166 a, says that this is the settled doctrine in England, Michigan, and Connecticut; that in North Carolina and Tennessee the question seems to remain open; and that in Massachusetts the English doctrine seems to be growing in favor, contrary to the earlier cases; but that in the other States the creditor's right to sue has been generally recognized. The course of decision in this State favors the creditor's right to sue, and in principle, we think, recognizes it, though it has not hitherto

extended to a purely oral contract. Urquhart v. Brayton, 12 R. I. 169; Merriman v. Social Manufacturing Co., 12 R. I. 175. Courts that allow the action generally hold that it is not affected by the statute of frauds, though, as Mr. Browne remarks, they do not unite in the reasons which they give for so holding. Mr. Browne himself suggests that the contract, as between the creditor and promisor, arises by implication out of the duty of the promisor under his contract with the debtor, and that, being implied, it is not within the statute of frauds. Browne on the Statute of Frauds, § 166 b. The view accords with the doctrine of Brewer v. Dyer (7 Cush. 337), where the court remarks, p. 340, "that the law, operating on the act of the parties, creates the duty, establishes the privity, and implies the promise and obligation on which the action is founded."

The diversity of decision shows that the action cannot be maintained without resorting to implications or assumptions which the courts do not always find it easy to allow, and which they sometimes refuse to allow. It seems to us that we shall best find the grounds, if there are any, on which the action can be maintained, by an analysis or explication of the contract with the debtor. The contract is this: A agrees with B, for a consideration moving from B, to pay to C the debt which B owes to C. The contract is absolute. If A does not pay the debt, and B has to pay, it is broken. It is, therefore, a contract by A to pay the debt in lieu of B, or in relief of B; to take it on himself, and become, so far as he can independently of C, the debtor of C in place of B. The contract, as between A and B, is not collateral, but substitutional. But, this being so, how does C, who is not a party to it, get the right to sue A upon or by reason of it? It has been held that he gets this right directly from the contract itself, because B, in making it with A, makes it for C, if C desires to accede to it, as well as for himself, so that C has only to ratify or assent to it, which he does unequivocally by suing on it. But, in this view, if C accepts the contract, he must accept it as made; that is, as a contract by which A agrees that he, instead of B, will pay the debt which B owes to C. C cannot, at the same time, assent to the contract and dissent from the terms of it. Accordingly, if he sues A on the contract, he must sue him instead of B, and cannot also sue B, and B is therefore released. But, as we have seen, another view has been taken. It has been held that the contract between A and B imposes a duty upon A to pay to C the debt which B owes to him, and that from this duty the law implies a promise by A in favor of C to pay B's debt to C. But if a promise is implied from the duty, the promise must correspond to the duty. The duty which the contract imposes upon A is that he, instead of B, shall pay the debt which B owes to C, and accordingly so must be the promise to be implied from it. If, therefore, C sues A upon the implied promise, he must sue him as liable,

instead of B, for the debt of B to him, C; he cannot consistently sue both A and B, and consequently B is released.

We do not claim that either of these views is free from difficulty. Either of them, however, is free from one difficulty which other views encounter, and which is a principal reason why the courts which refuse to allow the action refuse to do so. Other views give the creditor the benefit of the new contract for nothing, since they allow him still to retain his hold upon the original debtor; whereas, according to either of the views above set forth, the creditor cannot have the benefit of the new contract without assenting to the terms of it, thereby releasing the original debtor, so that the assent is in itself a consideration. As cases which support these views, we will refer to Warren v. Batchelder, 16 N. H. 580; Bohanan v. Pope, 42 Me. 93. See also Clough v. Giles, 2 New Eng. Reporter, 870. Of course, if either view be correct, the liability under the contract is not collateral, but direct and substitutional, and therefore not within the statute of frauds.

We do not think this case is distinguishable in principle from Urquhart v. Brayton, 12 R. I. 169. The doctrine of the latter case is not only just and convenient, but also consonant with the purposes of the parties, and we are not prepared to recede from it. As is remarked by the court in Lehow v. Simonton *et al.* (3 Colorado, 346), "it accords the remedy to the party who in most instances is chiefly interested to enforce the promise, and avoids multiplicity of actions."

We think the declaration proper in point of form, and we do not think the nonsuit is justifiable on the ground of variance.

In Warren v. Batchelder (16 N. H. 580) the court held that a demand on the defendant was requisite before the suit. Whether this is so we need not decide, for the evidence in this case shows a demand before suit.

STINESS, J., non-concurring.

Petition granted.

9 Cyc. 378 (7); W. P. 256 (86); 271 (46); 274 (55).

LAWRENCE *v.* FOX.

20 NEW YORK, 268.—1859.

Appeal from the Superior Court of the city of Buffalo. On the trial before Mr. Justice Masten, it appeared by the evidence of a bystander, that one Holly, in November, 1857, at the request of the defendant, loaned and advanced to him $300, stating at the time that he owed that sum to the plaintiff for money borrowed of him, and had agreed to pay it to him the then next day; that the defendant, in consideration thereof, at the time of receiving the money, promised to pay it to the plaintiff the then next day. Upon this state of facts

the defendant moved for a nonsuit, upon three several grounds, viz.: That there was no proof tending to show that Holly was indebted to the plaintiff; that the agreement by the defendant with Holly to pay the plaintiff was void for want of consideration, and that there was no privity between the plaintiff and defendant. The court overruled the motion, and the counsel for the defendant excepted. The cause was then submitted to the jury, and they found a verdict for the plaintiff for the amount of the loan and interest, $344.66, upon which judgment was entered; from which the defendant appealed to the Superior Court, at General Term, where the judgment was affirmed, and the defendant appealed to this court. The cause was submitted on printed arguments.

H. GRAY, J. The first objection raised on the trial amounts to this: That the evidence of the person present, who heard the declarations of Holly giving directions as to the payment of the money he was then advancing to the defendant, was mere hearsay and therefore not competent. Had the plaintiff sued Holly for this sum of money, no objection to the competency of this evidence would have been thought of; and if the defendant had performed his promise by paying the sum loaned to him to the plaintiff, and Holly had afterwards sued him for its recovery, and this evidence had been offered by the defendant, it would doubtless have been received without an objection from any source. All the defendant had the right to demand in this case was evidence which, as between Holly and the plaintiff, was competent to establish the relation between them of debtor and creditor. For that purpose the evidence was clearly competent; it covered the whole ground and warranted the verdict of the jury.

But it is claimed that, notwithstanding this promise was established by competent evidence, it was void for the want of consideration. It is now more than a quarter of a century since it was settled by the Supreme Court of this State—in an able and painstaking opinion by the late Chief Justice Savage, in which the authorities were fully examined and carefully analyzed—that a promise in all material respects like the one under consideration was valid; and the judgment of that court was unanimously affirmed by the court for the correction of errors. Farley v. Cleveland, 4 Cow. 432; *same case in error*, 9 Id. 639. In that case one Moon owed Farley and sold to Cleveland a quantity of hay, in consideration of which Cleveland promised to pay Moon's debt to Farley; and the decision in favor of Farley's right to recover was placed upon the ground that the hay received by Cleveland from Moon was a valid consideration for Cleveland's promise to pay Farley, and that the subsisting liability of Moon to pay Farley was no objection to the recovery. The fact that the money advanced by Holly to the defendant was a loan to him for a day, and that it thereby became the property of the defendant, seemed to impress the defend-

ant's counsel with the idea that because the defendant's promise was not a trust fund placed by the plaintiff in the defendant's hands, out of which he was to realize money as from the sale of a chattel or the collection of a debt, the promise, although made for the benefit of the plaintiff, could not inure to his benefit. The hay which Cleveland delivered to Moon was not to be paid to Farley, but the debt incurred by Cleveland for the purchase of the hay, like the debt incurred by the defendant for money borrowed, was what was to be paid. That case has been often referred to by the courts of this State, and has never been doubted as sound authority for the principle upheld by it. Barker v. Bucklin, 2 Denio, 45; Hudson Canal Company v. The Westchester Bank, 4 Id. 97. It puts to rest the objection that the defendant's promise was void for want of consideration. The report of that case shows that the promise was not only made to Moon but to the plaintiff Farley. In this case the promise was made to Holly and not expressly to the plaintiff; and this difference between the two cases presents the question, raised by the defendant's objection as to the want of privity between the plaintiff and defendant.

As early as 1806 it was announced by the Supreme Court of this State, upon what was then regarded as the settled law of England, "that where one person makes a promise to another for the benefit of a third person, that third person may maintain an action upon it." Schemerhorn v. Vanderheyden (1 John. R. 140) has often been reasserted by our courts and never departed from. The case of Seaman v. White has occasionally been referred to (but not by the courts), not only as having some bearing upon the question now under consideration, but as involving in doubt the soundness of the proposition stated in Schemerhorn v. Vanderheyden. In that case one Hill, on the 17th of August, 1835, made his note and procured it to be indorsed by Seaman and discounted by the Phœnix Bank. Before the note matured and while it was owned by the Phœnix Bank, Hill placed in the hands of the defendant, Whitney, his draft accepted by a third party, which the defendant indorsed, and on the 7th of October, 1835, got discounted and placed the avails in the hands of an agent with which to take up Hill's note; the note became due, Whitney withdrew the avails of the draft from the hands of his agent and appropriated it to a debt due him from Hill, and Seaman paid the note indorsed by him and brought his suit against Whitney. Upon this state of facts appearing, it was held that Seaman could not recover: first, for the reason that no promise had been made by Whitney to pay, and second, if a promise could be implied from the facts that Hill's accepted draft, with which to raise the means to pay the note, had been placed by Hill in the hands of Whitney, the promise would not be to Seaman, but to the Phœnix Bank, who then owned the note; although, in the course of the opinion of the court, it was stated that, in all cases

the principle of which was sought to be applied to that case, the fund had been appropriated by an express undertaking of the defendant with the creditor. But before concluding the opinion of the court in this case, the learned judge who delivered it conceded that an undertaking to pay the creditor may be implied from an arrangement to that effect between the defendant and the debtor. This question was subsequently, and in a case quite recent, again the subject of consideration by the Supreme Court, when it was held, that in declaring upon a promise, made to the debtor by a third party to pay the creditor of the debtor, founded upon a consideration advanced by the debtor, it was unnecessary to aver a promise to the creditor; for the reason that upon proof of a promise made to the debtor to pay the creditor, a promise to the creditor would be implied. And in support of this proposition, in no respect distinguishable from the one now under consideration, the case of Schemerhorn v. Vanderheyden, with many intermediate cases in our courts, were cited, in which the doctrine of that case was not only approved but affirmed. The Delaware and Hudson Canal Company v. The Westchester County Bank, 4 Denio, 97.

The same principle is adjudged in several cases in Massachusetts. I will refer to but few of them. Arnold v. Lyman, 17 Mass. 400; Hall v. Marston, Id. 575; Brewer v. Dyer, 7 Cush. 337, 340. In Hall v. Marston the court say: "It seems to have been well settled that if A promises B for a valuable consideration to pay C, the latter may maintain assumpsit for the money;" and in Brewer v. Dyer, the recovery was upheld, as the court said, "upon the principle of law *long recognized and clearly established,* that when one person, for a valuable consideration, engages with another, by a simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement; that it does not rest upon the ground of any actual or supposed relationship between the parties, as some of the earlier cases would seem to indicate, but upon the broader and more satisfactory basis, that the law operating on the act of the parties creates the duty, establishes a privity, and implies the promise and obligation on which the action is founded." There is a more recent case decided by the same court, to which the defendant has referred, and claims that it at least impairs the force of the former cases as authority. It is the case of Mellen v. Whipple, 1 Gray, 317. In that case one Rollins made his note for $500 payable to Ellis and Mayo, or order, and to secure its payment mortgaged to the payees a certain lot of ground, and then sold and conveyed the mortgaged premises to the defendant, by deed in which it was stated that the "granted premises were subject to a mortgage for $500, which mortgage, with the note for which it was given, the said Whipple is to assume and cancel." The deed thus made was accepted by Whipple, the mortgage was afterwards duly

assigned, and the note indorsed by Ellis and Mayo to the plaintiffs intestate. After Whipple received the deed he paid to the mortgagees and their assigns the interest upon the mortgage and note for a time, and upon refusing to continue his payments was sued by the plaintiff as administratrix of the assignee of the mortgage and note. The court held that the stipulation in the deed that Whipple should pay the mortgage and note was a matter exclusively between the two parties to the deed; that the sale by Rollins of the equity of redemption did not lessen the plaintiff's security, and that as nothing had been put into the defendant's hands for the purpose of meeting the plaintiff's claim on Rollins, there was no consideration to support an express promise, much less an implied one, that Whipple should pay Mellen the amount of the note. This is all that was decided in that case, and the substance of the reasons assigned for the decision; and whether the case was rightly disposed of or not, it has not in its facts any analogy to the case before us, nor do the reasons assigned for the decision bear in any degree upon the question we are now considering.

But it is urged that because the defendant was not in any sense a trustee of the property of Holly for the benefit of the plaintiff, the law will not imply a promise. I agree that many of the cases where a promise was implied were cases of trusts, created for the benefit of the promisor. The case of Felton v. Dickinson (10 Mass. 189, 190) and others that might be cited are of that class; but concede them all to have been cases of trusts, and it proves nothing against the application of the rule to this case. The duty of the trustee to pay the *cestuis que trust,* according to the terms of the trust, implies his promise to the latter to do so. In this case the defendant, upon ample consideration received from Holly, promised Holly to pay his debt to the plaintiff; the consideration received and the promise to Holly made it as plainly his duty to pay the plaintiff as if the money had been remitted to him for that purpose, and as well implied a promise to do so as if he had been made a trustee of property to be converted into cash with which to pay. The fact that a breach of the duty imposed in the one case may be visited, and justly, with more serious consequences than in the other, by no means disproves the payment to be a duty in both. The principle illustrated by the example so frequently quoted (which concisely states the case in hand), "that a promise made to one for the benefit of another, he for whose benefit it is made may bring an action for its breach," has been applied to trust cases, not because it was exclusively applicable to those cases, but because it was a principle of law, and as such applicable to those cases.

It was also insisted that Holly could have discharged the defendant from his promise, though it was intended by both parties for the

benefit of the plaintiff, and therefore the plaintiff was not entitled to maintain this suit for the recovery of a demand over which he had no control. It is enough that the plaintiff did not release the defendant from his promise, and whether he could or not is a question not now necessarily involved; but if it was, I think it would be found difficult to maintain the right of Holly to discharge a judgment recovered by the plaintiff upon confession or otherwise, for the breach of the defendant's promise; and if he could not, how could he discharge the suit before judgment, or the promise before suit, made as it was for the plaintiff's benefit and in accordance with legal presumption accepted by him (Berly v. Taylor, 5 Hill, 577-584, *et seq.*), until his dissent was shown. The cases cited, and especially that of Farley v. Cleveland, establish the validity of a parol promise; it stands then upon the footing of a written one. Suppose the defendant had given his note in which, for value received of Holly, he had promised to pay the plaintiff and the plaintiff had accepted the promise, retaining Holly's liability. Very clearly Holly could not have discharged that promise, be the right to release the defendant as it may.

No one can doubt that he owes the sum of money demanded of him, or that in accordance with his promise it was his duty to have paid it to the plaintiff; nor can it be doubted that whatever may be the diversity of opinion elsewhere, the adjudications in this State, from a very early period, approved by experience, have established the defendant's liability; if, therefore, it could be shown that a more strict and technically accurate application of the rules applied would lead to a different result (which I by no means concede), the effort should not be made in the face of manifest justice.

The judgment should be affirmed.

Johnson, C. J., Denio, Selden, Allen, and Strong, JJ., concurred. Johnson, C. J., and Denio, J., were of opinion that the promise was to be regarded as made to the plaintiff through the medium of his agent, whose action he could ratify when it came to his knowledge, though taken without his being privy thereto.

Comstock, J., and Grover, J., dissented.

Judgment affirmed.

9 Cyc. 378 (7); W. P. 241 (19); 258 (85).

SULLIVAN *v.* SULLIVAN.

161 NEW YORK, 554.—1900.

Action by Patrick R. Sullivan, as administrator, etc., against Catherine Sullivan. From a judgment of the Appellate Division (39 App. Div. 99) affirming a judgment for the plaintiff, defendant appeals.

WERNER, J. On the 10th day of October, 1892, the plaintiff's in-

testate, Catherine Sullivan, deposited with the Chemung Canal Bank the sum of $2000 and received therefor a certificate of deposit in the following form:

"$2000 ELMIRA, N. Y., Oct. 10th, 1892.

"Catherine Sullivan has deposited in this bank two thousand dollars, payable one day after date to the order of herself, or, in the case of her death, to her niece, Catherine Sullivan, of Utica, upon the return of this certificate, with interest at 3 per cent per annum, if held six months. Not subject to check.

"No. 26,638. J. H. ARNOT, V. P."

She retained possession of said certificate until her death, which occurred on the 8th day of February, 1893, and after her death it was found among her papers.

This action was originally brought against the individuals who composed the firm known as the Chemung Canal Bank, and was upon their application continued against the present defendant, who claims to be entitled to the moneys represented by said certificate. Upon the trial, oral evidence was adduced to show, and the court found, that it was the intention of the plaintiff's intestate to have the said certificate of deposit so drawn that in case of her death, without having withdrawn the deposit, it could be drawn by the defendant. The trial court also found that "no attempt was made by the plaintiff's intestate to create a trust to exist during the life of the said intestate. Until her death, the bank was her debtor." Defendant's father, whose real name was Brown, was a nephew of the plaintiff's intestate, and lived with her for thirty-six years, taking the name of Sullivan, and being regarded and treated as an adopted son, although no legal adoption was ever consummated. The defendant was born in the house of plaintiff's intestate, in Elmira, and lived there for four or five years after her birth, at the end of which period she removed with her parents to the city of Utica. Plaintiff's intestate, who was childless, exhibited and expressed on all occasions great fondness for the defendant, and at the time of said deposit stated to the teller of said bank that "she wanted it fixed to herself, or, in case of her death, to her niece, Catherine Sullivan, of Utica."

In asserting her claim to this fund, the defendant invokes several distinct principles of law, the first of which is that the deposit of this money and the issuance of this certificate constituted a valid contract between plaintiff's intestate and the bank for the benefit of the defendant. Buchanan v. Tilden, 158 N. Y. 109; Dutton v. Pool, 1 Vent. 318, and Todd v. Weber, 95 N. Y. 181, are cited in support of this contention. As I read these cases, they have no application to the case at bar; for in each of them there was a valid contract, founded upon a sufficient consideration, for the benefit of a third person, which the latter could enforce. Here there was

no contract to which the defendant was a privy, nor can it be said that the relations of the plaintiff's intestate and the defendant were such as to furnish any consideration for such a contract, if one had existed.

[The court then holds that the transaction did not create a trust.]

Judgment affirmed.

9 Cyc. 378 (7); W. P. 219 (28); 249 (56); 250 (66).

SMYTH *et al. v.* CITY OF NEW YORK *et al.*

203 NEW YORK, 106.—1911.

CULLEN, C. J. This action is brought by the owners of the Murray Hill Hotel, which abutted on Park Avenue, borough of Manhattan, city of New York, to recover damages to such hotel caused by the explosion of a dynamite magazine located on said avenue during the construction of the rapid transit subway. The construction of the subway at this point was being carried on by one Shaler, a sub-contractor. The excavation was being made through rock which had to be removed by blasting. For this purpose dynamite was employed—the central part of the carriageway of the avenue being fenced against use by the public, and a small wooden building was placed there in which the dynamite for use was kept. Of the details of the explosion, it is enough to say that in our opinion the evidence was sufficient to authorize the jury to find that an excessive amount of dynamite was stored in the magazine and that proper precautions had not been taken for guarding it against the danger of explosion. The action, however, is not brought against the sub-contractor, but against the city of New York, McDonald, who contracted with the city for the construction and subsequent operation of the subway, and the Rapid Transit Subway Construction Company, which rendered financial aid to McDonald in the execution of his contract. The question presented on this appeal is whether any of these defendants is liable for the negligence of the sub-contractor.

On February 21, 1900, under the provisions of the Rapid Transit Act (L. 1892, ch. 556; L. 1896, ch. 729; L. 1900, ch. 16; L. 1901, ch. 4; L. 1904, ch. 752), the rapid transit commissioners were authorized to enter into a contract on behalf of the city for the construction and equipment of a railroad upon the route and in accordance with the general plans adopted by the commissioners. Subdivision 5, section 24 of the Rapid Transit Act authorized the contractor to enter upon and underneath the several streets of the city for the prosecution of the work and the use of such streets was declared to be a public use. In September, 1900, Shaler entered

into a sub-contract with McDonald to do the work along the line of which the explosion occurred.

We think it clear that under the previous decisions of this court the city was not liable for the negligence of the contractor to whom the work had been let. (Froelich v. City of New York, 199 N. Y. 466; Uppington v. City of New York, 165 N. Y. 222.) Nor do we think the city can be held liable on the ground that it suffered a nuisance to be maintained in the street, the street having been withdrawn from its possession and control. It was not liable for the default of the fire department or of the bureau of combustibles. (Maxmilian v. Mayor, etc., of N. Y., 62 N. Y. 160; Ham v. Mayor, etc., of N. Y., 70 N. Y. 459; Smith v. City of Rochester, 76 N. Y. 506, 513; Terhune v. Mayor, etc., of N. Y., 88 N. Y. 247.) Nor was there evidence to show that the city authorities were aware that any excessive quantity of dynamite was being stored. The complaint was, therefore, properly dismissed as against the city, and it may be that the same doctrine that gives immunity to the city would also give immunity to the defendant McDonald, the principal contractor, for the negligence of his independent subcontractor. Whether this is so, it is unnecessary to determine, as we are of opinion that McDonald was liable in this case by the express terms of his contract with the rapid transit commissioners. The contract contained the following provisions:

"Traffic to be Maintained. Indemnification for Accidents.—The contractor shall during the performance of the work safely maintain the traffic on all the streets, avenues, highways, parks and other public places in connection with the work, and take all necessary precautions to place proper guards for the prevention of accidents, and put up and keep at night suitable and sufficient lights and indemnify and save harmless the city against and from all damages and costs to which it may be put by reason of injury to the person or property of another or others, resulting from negligence or carelessness in the performance of the work or from guarding the same, or from any improper materials used in its construction, or by or on account of any act or omission of the contractor or the agents thereof.

"Contractor's Liability for Damage to Abutting Property.—*The contractor shall be responsible for all damage which may be done to abutting property or buildings or structures thereon by the method in which the construction hereunder shall be done, but not including in such damage any damage necessarily arising from proper construction pursuant to this contract or the reasonable use, occupation or obstruction of the streets thereby.*"

An analysis of this portion of the contract shows that it contained three independent and different covenants or agreements on the part of the contractor. The first is one to safely maintain

traffic on the public streets and to take necessary precautions and erect proper guards for the prevention of accidents; the second, to indemnify the city against any or all damage to which it might be put by reason of negligence in the performance of the work; the third, to be responsible for damages to abutting property, buildings or structures arising from other than the proper construction of the work and the reasonable use and occupation of the streets. As we construe this last clause—a construction supported by the marginal notes—it was not an agreement of indemnity to the city, for that was sufficiently covered by the preceding provisions, but an agreement to be responsible to abutting owners for damages arising from improper construction or unreasonable use and occupation of the streets. Therefore, the question before us is further narrowed to this: Can an abutting owner maintain an action under this provision of the contract to which contract he is not a party? To sustain a negative answer the respondent relies upon the decision of this court in French v. Vix (143 N. Y. 90). In that case the owner of a lot of land entered into a contract with the defendants for the construction of a house, under which the latter agreed to become answerable "and accountable for any damages that may be done to the property or person of any neighbor" during the performance of the work. The defendants made a sub-contract for the excavation, the sub-contractor agreeing to assume all responsibility for damage to persons or property. The plaintiff owned an adjoining house which was injured by the blasting carried on by the sub-contractor. She sought to maintain the action on the provision of the defendant's contract with the owner of the adjacent land. She was defeated in this court on two grounds: 1. That the contract was simply one of indemnity and was not intended for the plaintiff's benefit. That ground has no application to the present case under the construction we have given to the defendant's contract. 2. That even if the contract was intended for her benefit she could not recover because she was not a party to it, nor in privity with the parties, and as to her it was without consideration. The second ground is but a reiteration of the general rule of law that a stranger to a contract cannot maintain an action upon it, and if the defendant's contract were with private persons that rule of law would be applicable. But even between private parties the rule is not universal, and a third party may maintain an action on a contract against the promisor where the contract is made for his benefit and some obligation or duty to the third party rests on the promisee. Thus, where the promisee is indebted to a stranger to the contract, a promise made on sufficient consideration may be enforced by the latter. (Lawrence v. Fox, 20 N. Y. 268; Burr v. Beers, 24 N. Y. 178.) In Todd v. Weber (95 N. Y. 181) it was held that the relation

of parent and child was sufficient consideration for a contract made by the parent with others for the support of the child, and that the latter might enforce it by action. In Buchanan v. Tilden (158 N. Y. 109) the same doctrine was held in regard to a contract made by a husband for the benefit of his wife. A still broader doctrine is held in the case of what may be termed public contracts. In Little v. Banks (85 N. Y. 258) it was said: "Contractors with the State, who assume, for a consideration received from the sovereign power, by covenant, express or implied, to do certain things, are liable, in case of neglect to perform such covenant, to a private action at the suit of the party injured by such neglect, and such contract inures to the benefit of the individual who is interested in its performance." (p. 263.) In that case the defendant had a contract with the state officers to sell and deliver to the public volumes of the law reports, which he was about to publish, at certain specified prices, and upon failure to comply with that agreement he agreed to pay to any persons aggrieved the sum of $100. It was held that the plaintiff, a person to whom the defendant had refused to deliver such reports, might maintain his action to recover the stipulated damages. In Robinson v. Chamberlain (34 N. Y. 389) a contractor for keeping the State canal in repair was held liable for injuries sustained by the canal boat of a private individual by the failure of the defendant to perform his contract. In Cook v. Dean (11 App. Div. 123; affd. on opinion below, 160 N. Y. 660) a contractor who entered into a contract with the supervisors of two counties for the construction of a bridge over a creek dividing the two counties, and also for the construction and maintenance of a temporary bridge during the progress of the main work, was held liable for defects in the temporary structure through which the plaintiff was injured, though neither of the counties would have been liable for such neglect. (Markey v. County of Queens, 154 N. Y. 675, 684.) The most recent case in this court is that of Pond v. New Rochelle Water Co. (183 N. Y. 330). There the predecessor of the defendant had made a contract with the village of Pelham Manor for supplying not only the village itself, but also all its inhabitants with a supply of water at certain specified rates. The plaintiff, who was a resident and householder of said village, brought the action to restrain the defendant from exacting from him a higher water rate than that specified in the agreement with the village. The objection that the plaintiff was a stranger to the contract was overruled. Judge Edward T. Bartlett, writing for the court, said: "In the case before us we have a municipality entering into a contract for the benefit of its inhabitants, the object being to supply them with pure and wholesome water at reasonable rates. While there is not presented a domestic relation like that of father and child

or husband and wife, yet it cannot be said that this contract was made for the benefit of a stranger. In the case before us the municipality sought to protect its inhabitants, who were at the time of the execution of the contract consumers of water, and those who might thereafter become so, from extortion by a corporation having granted to it a valuable franchise extending over a long period of time." (See, also, Rochester Telephone Co. v. Ross, 195 N. Y. 429.)

In principle the case cited and the one before us seem to be almost identical. There, as here, the first object of the contract was for the supply of a corporate, as distinguished from a governmental want; there it was supplying water for the hydrants, street and fire purposes; here the construction of a railroad. In the first case it was held that the village in its governmental character had sufficient interest in the welfare of its citizens and inhabitants to secure to each of them a supply of water at reasonable rates. In the case before us it was well known and generally appreciated that for at least some very substantial part of the discomfort, damage and injury occasioned to the abutters by even the most careful and proper prosecution of the work, the abutter could not recover indemnity or compensation. It was also appreciated that in the prosecution of all great works, at times negligence and fault will occur, and that such fault will often be on the part of irresponsible parties from whom there would be small chance of recovering pecuniary redress. Therefore, though the city might not be liable for injuries occasioned by such negligence, it was entirely proper, if not morally obligatory upon the part of the rapid transit commissioners to secure the abutting owners from loss or damage occasioned by negligence and improper conduct of the work. This could only be accomplished by placing liability for the negligence upon a responsible contractor to whom they might give out the work, for the commissioners could not dictate the sub-contractors with whom he might contract. We are of opinion, therefore, that the defendant McDonald was, under his contract, liable for the damages sustained by the plaintiffs, and as to him the judgment below should be reversed, and a new trial granted, with costs to abide the event. It should be affirmed, with costs, as to the city of New York and the Rapid Transit Subway Construction Company, as to which last defendant we see no possible theory for imposing liability on it.

Werner, Willard Bartlett, Chase and Collin, JJ., concur with Cullen, Ch. J.; Haight, J., reads opinion dissenting from affirmance of judgment in favor of the city of New York; Hiscock, J., absent.[1]

[1] *Right of a beneficiary to sue in New York.* At present the right of a direct beneficiary to sue seems to be confined to the following classes of cases: (*1*) Where the promise runs to the beneficiary (Rector v. Teed, 120 N. Y.

THOMAS MFG. CO. *v.* PRATHER.

65 ARKANSAS, 27.—1898.

Action by D. J. Prather against the Thomas Manufacturing Company. From a judgment for plaintiff, defendant appeals. Reversed.

WOOD, J. Appellee, who was a physician and surgeon, sued appellant for $300, the alleged value of professional services rendered by him to one Brown, an employé of appellant. Appellee alleges that appellant, for a valuable consideration, entered into a contract with Brown, whereby it was to furnish him medical attendance in case of an accidental injury while engaged in appellant's business. That part of the contract which appellee claims was for his benefit, and upon which he bases his right to recover, is as follows: "This is to certify that we are insured in a large and reliable insurance company against accidents resulting in bodily injury or death to J. R. Brown and other employés, so that we can agree that the above-named employé shall receive from us, in case of an accident received by him when actively engaged in our business, the following: (1) In case of an accidental injury a sum not exceeding," etc., "and furnish medical attendance." The answer denied liability. The court found the following facts, so far as may be necessary to set them out, to wit: "That the defendant company entered into a contract by which it, in case of accident, while in its employment, to one Brown, its employé, would, among other things, furnish him a physician; that on the 14th day of September, 1892, and while said contract was in force, said Brown was injured while in defendant's employment; that the plaintiff, a physician, was as such called in by Brown, and waited on him, and rendered him the services sued for, extending from September 16, 1892, to April 1, 1893, to the value of $300; that this employment of plaintiff as physician was known to defendant company, and by it, through its officers, fully approved." Appellant asked the court to find as a fact that "there was no agreement made by the Thomas Manufacturing Company with Brown to pay Dr. Prather, or any other physician, for medical attendance upon said Brown,"

583; and see also 1st Nat. Bank v. Chalmers, 144 N. Y. 432 and Hamilton v. Hamilton, 127 Appellate Div. 871); *or* (2) Where there is a pecuniary obligation running from the promisee to the beneficiary (Vrooman v. Turner, 69 N. Y. 280); *or* (*3*), Where the contract is made for the benefit of the wife (Buchanan v. Tilden, 158 N. Y. 109) or of a child of a party to the contract (Schemerhorn v. Vanderheyden, 1 Johns, 139; Todd v. Weber, 95 N. Y. 181); *or* (*4*) Where the contract is made by the State or municipal corporation for the benefit of the individual citizens (Smyth v. City of New York, 203 N. Y. 106). Beyond these classes of cases the New York authorities do not go (Sullivan v. Sullivan, 161 N. Y. 554; and especially Smyth v. New York, *supra.*)

which the court refused. And appellant asked the court to declare the following as the law: "A contract entered into upon the terms proposed in the card aforesaid would not inure to the benefit of the plaintiff, and if the court finds that the defendant made, and Brown accepted, the contract there proposed, the plaintiff cannot recover"; which the court refused, holding that "the contract entered into by defendant company with Brown, and services rendered by plaintiff, with the assent and approval of defendant company, created a liability to plaintiff." Exceptions to the ruling of the court upon these points present the only question we need consider, to wit, was the contract for appellee's benefit?

This court long ago ruled, in line with the doctrine which generally obtains in this country, that where a promise is made to one upon a sufficient consideration, for the benefit of another, the beneficiary may sue the promisor for a breach of his promise. Chamblee v. McKenzie, 31 Ark. 155; Talbot v. Wilkins, Id. 411; Hecht v. Caughron, 46 Ark. 132. This doctrine operates as an exception to the elementary rule of law, that a stranger to a simple contract, from whom no consideration moves, cannot sue upon it. National Bank v. Grand Lodge, 98 U. S. 123; Mellen v. Whipple, 1 Gray, 317; Greenwood v. Sheldon, 31 Minn. 254, 17 N. W. 478. Therefore it should be applied cautiously, and restricted to cases coming clearly within its compass. The following prerequisites for the application of the doctrine were announced by the Court of Appeals of New York in Vrooman v. Turner, 69 N. Y. 280, viz.: "There must be—First, an intent by the promisee to secure some benefit to the third party; and, second, some privity between the two,—the promisee and the party to be benefited,—and some obligation or duty owing from the former to the latter, which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally." In Durnherr v. Rau, 135 N. Y. 222, 32 N. E. 50, the court say: "It is not sufficient that the performance of the covenant may benefit a third person. It must have been entered into for this benefit, or, at least, such benefit must be the direct result of performance, and so within the contemplation of the parties." See, also, American Exch. Bank v. Northern Pac. R. Co., 76 Fed. 130. "Of course, the name of the person to be benefited by the contract need not be given, if he is otherwise sufficiently described or designated. Indeed, he may be one of a class of persons, if the class is sufficiently described or designated." Burton v. Larkin, 36 Kan. 250, 13 Pac. 400. Applying the foregoing principles to the contract under consideration, it is manifest, from the nature and terms of the contract, that neither the appellee individually, nor any of a class to which he belonged, was intended to be considered as primarily the party in interest. Austin v. Seligman, 18 Fed. 523; Simson v. Brown, 68 N. Y. 355, 361,

362; Wright v. Terry, 23 Fla. 160, 2 South. 6; Greenwood v. Sheldon, 31 Minn. 254, 17 N. W. 478; Washburn v. Investment Co. (Or.) 38 Pac. 620. The clause, "we can furnish medical attendance," was solely for the benefit of Brown, and the purpose of making it upon the part of appellant was doubtless to induce him to enter its service upon terms that would, to it, be advantageous. The most that can be said about it, so far as any physician was concerned, is that, upon the happening of the contingency which it contemplated,—the accidental injury,—the performance of the contract would result incidentally to his benefit. This would not entitle him to sue the company. Chung Kee v. Davidson, 73 Cal. 522, 15 Pac. 100. Moreover, the contract here was "to furnish medical attendance," not to pay the wages or for the services of a physician whom Brown might employ. According to the express terms of the contract, the company did not surrender to Brown the right to bind it by a contract he might make with a physician, or constitute him its agent to employ a physician, and hence the company is not bound, according to the written contract, for the services of a physician whom Brown employed. But the court found "that this employment of plaintiff as physician was known to defendant company, and by it through its officers fully approved." This might be sufficient, in a suit brought by Brown against the company to recover of it the sum which he had paid his physician, to estop the company from denying that it had waived its right to furnish its own physician, provided the company knew that the physician was called by Brown in reliance upon his contract for it "to furnish him medical attendance." But this finding cannot avail appellee, for he is suing upon an express written contract, which, as we have seen, was not for his benefit. It could not avail him, upon any implied contract of the company, to pay him for his services to Brown, for other facts show that there was no such contract. Appellee was employed by Brown, and in his testimony he says: "As to looking to any one for payment, of that I cannot say that I looked to any one but Brown. I did not look to the Thomas Manufacturing Company when I first went. I looked to the Thomas Manfacturing Company in general connection with the other company. When the people of the Thomas Manufacturing Company intimated to me that the company would pay, I did not feel that I would look to them especially. . . . I would have rendered the services to Brown that I did render regardless of whether the Thomas Manufacturing Company or Brown would have been responsible." In Canney v. Railroad Co., 63 Cal. 501, the plaintiff, a physician, was, at the instance and request of certain parties wounded by a railroad accident, attending them, when the president of the railroad company, in the absence of the physician, told the wounded persons to employ whatever physician they chose, and the company would pay

the bills. The physician was advised of this, but he testified that he attended the wounded until their recovery in pursuance of the original calling. It was held, in an action against the company upon contract for services performed, that there was no mutuality, by contract between them, and no liability attached to the railroad company for the services performed by the plaintiff to the persons who employed them. Note to Austin v. Seligman, 18 Fed. 525. As there could be no recovery by appellee upon the contract sued on, the other questions pass out. Reversed and dismissed. (Bunn, C. J. dissenting).[1]

9 Cyc. 380 (10); W. P. 277 (62-67); 12 H. L. R. 62; 16 H. L. R. 373; 25 H. L. R. 738.

DURNHERR *v.* RAU.

135 NEW YORK, 219.—1892.

Appeal from order of the General Term of the Supreme Court in the fifth judicial department, made June 2d, 1891, which affirmed an order entered upon the minutes, setting aside a verdict in favor of plaintiff and granting a new trial.

This was an action to recover damages for an alleged breach of covenant in a deed from Emanuel Durnherr, plaintiff's husband, to defendant.

ANDREWS, J. The deed from Emanuel Durnherr to the defendant recited that it was given in payment of a debt owing by the grantor to the grantee of $660, "and the further considerations expressed herein." The grantee covenanted in the deed to pay all incumbrances on the premises "by mortgage or otherwise." This constitutes the only "further consideration" on his part expressed therein.

[1] In Nolton v. Western R. R., 15 N. Y. 444, defendant was under contract with the government to carry mails and the mail agent. Plaintiff was the mail agent and was injured in a railroad accident while performing his duties. He sued the railroad company and the court held: "In contracting for the transportation of the mail agent, the parties had no more in view any benefit or advantage to him, than if the contract had been to transport a chattel. The government took care of the public interests, and left those of the mail agent to such protection as the law would afford. . . . My conclusion therefore is, that this action cannot be maintained upon the basis of a contract express or implied. It necessarily follows that it must rest exclusively upon that obligation which the law always imposes upon every one who attempts to do anything, even gratuitously, for another, to exercise some degree of care and skill in the performance of what he has undertaken."

"The fact that the person to whose benefit the promise may inure is uncertain at the time it is made, and that it cannot be known until the happening of a contingency, cannot deprive the person who afterwards establishes his claim to be the beneficiary of the promise of the right to recover upon it."—Whitehead v. Burgess, 61 N. J. L. 75.

The deed also declared that the wife of the grantor (the plaintiff) reserved her right of dower in the premises. The conveyance contained a covenant of general warranty by the grantor, and the only legal operation of the clause respecting the dower of the wife was to limit the scope of the warranty by excluding therefrom her dower right. By the foreclosure of the mortgages on the premises existing at the time of the conveyance, in which (as is assumed) the wife joined, the title has passed to purchasers on the foreclosure, and the inchoate right of dower in the wife has been extinguished. This action is brought by the wife on the defendant's covenant in the deed, and she seeks to recover as damages the value of her inchoate right of dower, which was cut off by the foreclosure.

The courts below denied relief, and we concur in their conclusion. The covenant was with the husband alone. He had an interest in obtaining indemnity against his personal liability for the mortgage debts, and this, presumably, was his primary purpose in exacting from the grantee a covenant to pay the mortgages. The cases also attribute to the parties to such a covenant the further purpose of benefiting the holder of the securities, and the natural scope of the covenant is extended so as to give them a right of action at law on the covenant, in case of breach, as though expressly named as covenantees. Burr v. Beers, 24 N. Y. 178. But the wife was not a party to the mortgages, and in no way bound to pay them. She had an interest that they should be paid without resort to the land, so that her inchoate right of dower might be freed therefrom. The husband, however, owed her no duty enforcible in law or equity to pay the mortgages to relieve her dower. The most that can be claimed is that the mortgages having (as is assumed) been executed to secure his debts, and he having procured the wife to join in them and pledge her right for their payment, he owed her a moral duty to pay the mortgages, and thereby restore her to her original situation. But according to our decisions no legal or equitable obligation, of which the law can take cognizance, was created in favor of the wife against the husband or his property by these circumstances. She was not in the position of a surety for her husband. Her joinder in the mortgages was a voluntary surrender of her right for the benefit of the husband, and bound her interest to the extent necessary to protect the securities. Manhattan Co. v. Evertson, 6 Pai. 467; Hawley v. Bradford, 9 Pai. 200. There is lacking in this case the essential relation of debtor and creditor between the grantor and a third person seeking to enforce such a covenant, or such a relation as makes the performance of the covenant at the instance of such third person a satisfaction of some legal or equitable duty owing by the grantor to such person, which must exist according to the cases in order to entitle a stranger to the covenant

to enforce it. It is not sufficient that the performance of the covenant may benefit a third person. It must have been entered into for his benefit, or at least such benefit must be the direct result of performance and so within the contemplation of the parties, and in addition the grantor must have a legal interest that the covenant be performed in favor of the party claiming performance. Garnsey v. Rogers, 47 N. Y. 233; Vrooman v. Turner, 69 N. Y. 280; Lorillard v. Clyde, 122 N. Y. 498. The application of the doctrine of Lawrence v. Fox, 20 N. Y. 268, to this case would extend it much further than hitherto, and this cannot be permitted in view of the repeated declarations of the Court that it should be confined to its original limits.

The order should be affirmed, and judgment absolute ordered for the defendant with costs.

All concur.

Order affirmed and judgment accordingly.

W. P. 277 (65).

ECONOMY BUILDING & LOAN ASS'N *v.* WEST JERSEY TITLE & GUARANTEE CO.

64 NEW JERSEY LAW, 27.—1899.

This action is upon contract. Its purpose is a recovery of damages alleged to have been suffered by plaintiff because it made a loan on the security of a mortgage on real estate upon the faith of a certificate of defendant that it was free from prior incumbrances, which certificate was untrue, there being in fact a prior recorded incumbrance, the foreclosure of which caused the loss of plaintiff's loan. Plaintiff has set out his cause of action in two special counts, and defendant has demurred to each. Overruled.

MAGIE, C. J. It is not claimed that there has been imposed by law upon defendant a duty in respect to the transaction with plaintiff for the breach of which an action would lie under the authority of Appleby v. State, 45 N. J. Law, 161. In the opinion of Mr. Justice Depue in that case it was suggested whether the liability of a county clerk for untrue statements in a certificate of search of title would arise out of his official position, or rather out of his employment to make the search, in which case his liability would extend only in favor of the person employing him, and with whom he was in privity by the contract of employment. The defendant has no official character, but from the statements of the declaration we must assume that it has corporate capacity to do the acts which it is charged with doing, viz. examining the title of real estate, and certifying to incumbrances

thereon. If possessed of such capacity, there can be no doubt that, upon being employed to examine and certify, it undertook a duty in favor of the employer for the breach of which it would become liable to him.

The question presented by the demurrers is whether these counts sufficiently disclose a duty owed by defendant to plaintiff, and a breach of such duty. It will be convenient to first consider the second count. Omitting extraneous and unnecessary matters, that count may be thus paraphrased: It charges that one Moore desired to procure a loan of $3000, and applied to plaintiff therefor; that plaintiff agreed to make the loan on condition that Moore should secure it by a mortgage on certain land, which mortgage should be certified by defendant to be a first lien on said lands; that Moore applied to defendant, and made known to it his agreement with plaintiff; that he requested defendant to make the required search and certificate, which it agreed to do; that it agreed to make and deliver such search and certificate to Moore, to be by him delivered to plaintiff, and used for the purpose of obtaining said loan; that it made the certificate, a copy of which was annexed to and made part of the declaration, and delivered it to Moore, who paid defendant therefor, and then delivered it to plaintiff, who thereupon made the loan on the faith of the certificate. The certificate avers that the mortgaged lands were not incumbered by any previous mortgage. The count proceeds to aver that the certificate was carelessly made, and was untrue, because the lands were in fact subject to a prior recorded mortgage, which has since been foreclosed, to the injury of plaintiff.

The sole contention of the demurrant is that the count discloses no privity between it and plaintiff, but only a contract between it and Moore. But this is too narrow a view of the transaction set out in this count. Upon its averments there is disclosed either a contract between plaintiff and defendant, made through the agency of Moore, by which defendant was employed to examine and certify the title, or a contract of like employment between Moore and defendant, made for the benefit of plaintiff, upon which a right of action by plaintiff would arise. Joslin v. Spring Co., 36 N. J. Law, 141; Whitehead v. Burgess, 61 N. J. Law, 75. It is unnecessary to determine in which aspect the facts averred place the plaintiff's right of action. Either will support this count. In either aspect the contract disclosed a contract which included an undertaking to use care in discovering and certifying to previous recorded incumbrances. The averment that defendant carelessly omitted to certify to a previous incumbrance appearing in the public records establishes a complete right of action on the contract. This demurrer must be overruled.

The question whether the first count demurred to exhibits a good cause of action in favor of plaintiff is of more difficulty. The court

is equally divided in its views upon that question. It results that the demurrer to that count must also be overruled.[1]

9 Cyc. 373-374 (86-87).

GERMAN ALLIANCE INSURANCE CO. *v.* HOME WATER SUPPLY CO.

226 UNITED STATES, 220.—1912.

On writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the District of South Carolina, sustaining a demurrer to and dismissing the complaint in an action by an insurance company to recover from a water company because of its failure to furnish water for fire protection.

"The Spartan Mills" owned a number of houses in Spartanburg, South Carolina. They were damaged by fire on March 25, 1907. The German Alliance Company, which had insured the buildings, paid $68,000, the amount of the loss, took from the mills an assignment "of all claims and demands against any person arising from or connected with the loss or damage," and brought suit, in the United States court for the district of South Carolina, against the Home Water Supply Company, on the ground that the fire could easily have been extinguished and the damage prevented if the water company had complied with its contract and duty to furnish the inhabitants of the city with water for fire protection.

Mr. Justice LAMAR. In Ancrum v. Camden Water, Light, & Ice Co., 82 S. C. 284, 21 L. R. A. (N. S.) 1029, 64 S. E. 151, the Supreme Court of South Carolina, construing a contract much like the one here

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[1] In Ward v. Savings Bank, 100 U. S. 195, it is held (three justices dissenting) that an attorney employed by A to examine and report upon A's title to certain premises, and who gives a certificate that A's title "is good and unincumbered," is not liable to B, who lends money on the strength of this certificate, taking the premises as security, and afterwards discovers that there was, at the time the certificate was given, a prior duly recorded conveyance of the premises by A. This case is followed in Day v. Reynolds, 23 Hun (N. Y.), 131; Mechanics Bldg. Ass'n v. Whitacre, 92 Ind. 547; Mallory v. Ferguson, 50 Kans. 685; Zweigardt v. Birdseye, 57 Mo. App. 462; Tapley v. Wright, 61 Ark, 275; *Contra*, Dickle v. Abstract Co., 89 Tenn. 431; Gate City Abstract Co. v. Post, 55 Neb. 742. If it is shown that the abstractor or attorney is acting for the plaintiff, although he is engaged and paid by another person, a duty is undertaken toward plaintiff for the breach of which an action will lie. Lawall v. Groman, 180 Pa. St. 532; Brown v. Sims, 22 Ind. App. 317.

In Buckley v. Gray, 110 Cal. 339, it is held that an attorney employed by a testator is not liable to a legatee for negligently having the legatee witness the will, thus rendering the will ineffective as to him.

involved, held that a taxpayer could not maintain an action against a water company for damage due to its failure to furnish water as required by such an agreement with the city. The plaintiff, however, contends that although the present suit is for damage to property located in South Carolina, that decision is not of controlling authority, because it was rendered two years after this action was begun. Relying on Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10, it insists that when the contract was made, February, 1900, there was no settled State law on the subject, and therefore the Federal courts must decide for themselves, as matter of general law, the much controverted question as to a water company's liability to a taxpayer for failure to furnish fire protection, according to the terms of its contract with the city.

The courts have almost uniformly held that municipalities are not bound to furnish water for fire protection. Such was the unquestioned rule when they relied, as some still do, on wells and cisterns as a source of supply; nor was there any increase of liability with the gradual increase of facilities; though, with the introduction of reservoirs, standpipes, pumping stations, and steam engines, cities were frequently sued for damages resulting from an inadequate supply or insufficient pressure. But the city was under no legal obligation to furnish the water; and if it voluntarily undertook to do more than the law required, it did not thereby subject itself to a new or greater liability. It acted in a governmental capacity, and was no more responsible for failure in that respect than it would have been for failure to furnish adequate police protection.

If the common law did not impose such duty upon a public corporation, neither did it require private companies to furnish fire protection to property reached by their pipes. And there could, of course, be no liability for the breach of a common-law, statutory, or charter duty which did not exist. It is argued, however, that even if, in the first instance, the law did not oblige the company to furnish property owners with water, such a duty arose out of the public service upon which the defendant entered. But if, where it did not otherwise exist, a public duty could arise out of a private bargain, liability would be based on the failure to do or to furnish what was reasonably necessary to discharge the duty imposed. The complaint proceeds on no such theory. It makes no allegation that the defendant failed to furnish a plant of reasonable capacity, or neglected to extend the pipes where they were reasonably required. Nor is it charged that what the company actually did was harmful in itself or likely to cause injury to others, so as to bring the case within the principle applicable to the sale of unwholesome provisions, or misbranded poisons, which, in their intended use, would be injurious to purchasers from the original vendee. So that, notwithstanding numerous charges of culpable,

wanton, and malicious neglect of duty, this suit—whether regarded as *ex contractu* or *ex delicto*—is for breach of the provisions of the contract of February 14, 1900, which must, therefore, be the measure of plaintiff's right and of the defendant's liability.

Whether a right of action arises out of such a contract, in favor of a taxpayer, is a matter about which there has been much discussion and some conflict in decisions. Although for nearly a century it has been common for private corporations to supply cities with water under this sort of agreement, we find no record of a suit like this prior to 1878, when the Supreme Court of Connecticut, in a brief decision (Nickerson v. Bridgeport Hydraulic Co., 46 Conn. 24, 33 Am. Rep. 1), held that the property owner was a stranger to the agreement with the municipality, and therefore could not maintain an action against the company for a breach of its contract with the city. Since that time similar suits, some in tort and some for a breach of the contract, have been brought in many other States. In view of the importance of the question, the subject has been examined and re-examined, the contract subjected to the most critical analysis, and many elaborate opinions have been rendered. They are cited in 3 Dill. Mun. Corp. § 1340, and in the Ancrum Case, *supra.*

From them it appears that the majority of American courts hold that the taxpayer has no direct interest in such agreements, and therefore cannot sue *ex contractu.* Neither can he sue in tort, because, in the absence of a contract obligation to him, the water company owes him no duty for the breach of which he can maintain an action *ex delicto.* A different conclusion is reached by the Supreme Courts of three States in cases cited and discussed in Mugge v. Tampa Waterworks Co., 52 Fla. 371, 6 L. R. A. (N. S.) 1171, 120 Am. St. Rep. 207, 42 So. 81.[1] They hold that such a contract is for the benefit of taxpayers, who may sue either for its breach, or for a violation of the public duty which was thereby assumed.

The plaintiff presses these decisions to their logical conclusion and sues not for negligence in operating the plant, but for breach of the contract of construction. The complaint charges that as a direct consequence of the refusal to lay the pipes, as provided by the contract, there was no plug near enough to extinguish the fire. The other allegations as to putting in 4-inch instead of 6-inch pipe, and failing to install the electric cut-off, are immaterial, except on the theory that if the property owner was indeed a beneficiary, it, after acceptance, would be entitled to all the rights of the original promisee, and if not otherwise injured, might at least recover nominal damages for any breach. By the same reasoning it, with the other members of the class, might release the company from liability already incurred, or even

[1] Kentucky, North Carolina, Florida.

discharge it altogether from the duty of carrying out the agreement in the future. If this did not entirely substitute the taxpayer for the municipality, it would at least subject the promisor to liability to many, where it only had contracted with one. Dow v. Clark, 7 Gray, 198, 201.

In many jurisdictions a third person may now sue for the breach of a contract made for his benefit. The rule as to when this can be done varies in the different States. In some he must be the sole beneficiary. In others it must appear that one of the parties owed him a debt or duty, creating the privity necessary to enable him to hold the promisor liable. Others make further conditions. But even where the right is most liberally granted, it is recognized as an exception to the general principle, which proceeds on the legal and natural presumption that a contract is only intended for the benefit of those who made it. Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement to which he is not a party, he must, at least, show that it was intended for his direct benefit. For, as said by this court, speaking of the right of bondholders to sue a third party who had made an agreement with the obligor to discharge the bonds, they "may have had an indirect interest in the performance of the undertakings but that is a very different thing from the privity necessary to enable them to enforce the contract by suits in their own names." Second Nat. Bank v. Grand Lodge, F. & A. M., 98 U. S. 124, 25 L. ed. 76. Hendrick v. Lindsay, 93 U. S. 149, 23 L. ed. 857; National Sav. Bank v. Ward, 100 U. S. 202, 205, 25 L. ed. 623, 625.

Here the city was under no obligation to furnish the manufacturing company with fire protection, and this agreement was not made to pay a debt or discharge a duty to the Spartan Mills, but, like other municipal contracts, was made by Spartanburg in its corporate capacity, for its corporate advantage, and for the benefit of the inhabitants collectively. The interest which each taxpayer had therein was indirect,—that incidental benefit only which every citizen has in the performance of every other contract made by and with the government under which he lives, but for the breach of which he has no private right of action.

He is interested in the faithful performance of contracts of service by policemen, firemen, and mail contractors, as well as in holding to their warranties the vendors of fire engines. All of these employees, contractors, or vendors are paid out of taxes. But for the breaches of their contracts the citizen cannot sue, though he suffer loss because the carrier delayed in hauling the mail, or the policeman failed to walk his beat, or the fireman delayed in responding to an alarm, or the engine proved defective, resulting in his building being destroyed by fire. 1 Beven, Neg. 3d ed. 305; Pollock, Torts, 8th ed. 434, 547;

Davis v. Clinton Waterworks Co., 54 Iowa, 61, 37 Am. Rep. 185, 6 N. W. 126.

Each of these promisors of the city, like the water company here, would be liable for any tort done by him to third persons. But for acts of omission and breaches of contract, he would be responsible to the municipality alone. To hold to the contrary would unduly extend contract liability, would introduce new parties with new rights, and would subject those contracting with municipalities to suits by a multitude of persons for damages which were not, and, in the nature of things, could not have been, in contemplation of the parties.

The result is that plaintiff cannot maintain this action, and though based upon the general principle that the parties to a contract are those who are entitled to its rights, is in accordance with the particular intent of those who made this agreement.

If the company had, indeed, made a valid contract for the benefit of a third person, the amount of the damages for which it might be liable would be immaterial. Yet, where there is no such express agreement, and liability to a taxpayer is sought to be raised by implication, it is proper to test the correctness of the proposed construction by noting the results to which it would lead. The contract was made in February, 1900. By its terms the city was, during a period of ten years, to pay $40 per annum for each hydrant. During that time the property subject to damage by fire might double or quadruple in value. The failure to provide that the water rent of $40 per hydrant should rise or fall with the increase or decrease in such values indicates that liability for damage to that property was not in the contemplation of the parties, and that no payment therefor was included in the price for each hydrant. Otherwise the amount of payment would naturally have varied with the risk assumed.

In some States it is held that, in the absence of a statute, a city can neither directly nor indirectly make a contract with a water company that the latter should pay private individuals for fire damage, since that would involve the use of public money to secure a private benefit to the owner of private property. Hone v. Presque Isle Water Co., 104 Me. 217, 21 L. R. A. (N. S.) 1021, 71 Atl. 769. In the Ancrum Case, *supra,* the South Carolina court held that the amount paid per hydrant was so insignificant by comparison with the enormous risk involved, as clearly to indicate that neither the city nor the water company intended that the latter should be liable to the taxpayer for a breach of the company's contract with the city.

This conclusion deprives the property owner of no right, for if the city had owned the works, and had been guilty of the same acts as are charged against the water company here, no suit could have been maintained against the municipality. There was no creation of a right to fire protection if, instead of doing so itself, the city contracted

with a private company to furnish water. It bought the citizen no new right of action, and did not bargain to secure for him an indemnity against loss by fire, but left him to protect himself against that hazard by insurance, paying the premium direct to an insurance company instead of indirectly, through taxation. When, in pursuance of such precaution, the Spartan Mills insured the houses, and the plaintiff later settled the fire loss, there was no right of action in favor of the manufacturing company against the water company to which the insurance company could be subrogated.

The plaintiff urges that, whatever the rule elsewhere, it is entitled to recover under the decision in Guardian Trust & D. Co. v. Fisher, 200 U. S. 57, 50 L. ed. 367, 26 Sup. Ct. Rep. 186. But the facts there differ from those in this record. There the water company had an exclusive right to use the streets in the city of Greensboro, under an ordinance which, among other things, provided that "said water company shall be responsible for all damage sustained by the city, or any individual or individuals, for any injury sustained from the negligence of the said company, either in the construction or operation of their plant." P. 58. Buildings were destroyed as a result of the negligent failure of the company to furnish sufficient water while operating its plant. The owner brought suit against the water company in the courts of North Carolina, where it had previously been settled that such actions could be maintained. He recovered a judgment "for the tortious injury and damage done to the plaintiff by the negligence of the defendant." 128 N. C. 375, 38 S. E. 912, 115 Fed. 187. Execution issued, but no levy could be made, because the property of the water company was in possession of a receiver, appointed in foreclosure proceedings pending in the United States court. The plaintiff intervened therein, claiming that he was entitled to be paid before the bondholders by virtue of the North Carolina statute, which provided that "judgments for corporate torts" should take priority over older mortgages.

It was urged, among other things, by the bondholders, that the suit in the state court was really for breach of contract, and that entering the judgment as for a tort did not change the nature of the action so as to entitle the plaintiff to the benefits of the North Carolina statute.

It was that question alone, as to the character of the suit and judgment which was before this court. What was said in the opinion must be limited, under well-known rules, to the facts and issues involved in the particular record under investigation. The Fisher Case could not have decided the primary question as to the right of the taxpayer to sue, for that issue had been finally settled by the State court. It raised no Federal question and was not in issue on the hearing in this court. Neither did the Fisher Case overrule the principle annouced in Second Nat. Bank v. Grand Lodge, F. & A. M., 98 U. S. 124, 25 L.

ed. 76, that a third person cannot sue for the breach of a contract to which he is a stranger unless he is in privity with the parties and is therein given a direct interest. The judgment of the Circuit Court of Appeals is affirmed.[1]

9 Cyc. 374 (88); W. P. 249 (56); 254 (77); 20 H. L. R. 242; 5 Mich. L. R. 362; 19 Green Bag 129; Sunderland, Liability of water companies for fire losses, 3 Mich. L. R. 442; Kales, Liability of water companies for fire losses, 3 Mich. L. R. 501.

GIFFORD, AS RECEIVER, *v.* CORRIGAN, AS EXECUTOR.

117 NEW YORK, 257.—1889.

Appeal by defendant Corrigan, as executor of Cardinal John McCloskey, deceased. This action was brought to foreclose a mortgage executed by defendant, the Father Mathew Temperance Society. Defendant Corrigan, as executor, was sought to be charged for any deficiency on sale upon a covenant in a deed of the mortgaged premises executed to his testator by John McEvoy, by the terms of which the grantee assumed and agreed to pay the mortgage. The facts, so far as material to the questions discussed, are stated in the opinion.

FINCH, J. . . . Just after the issue of a summons in this action and the filing of a *lis pendens,* the executor of McEvoy formally re-

[1] In New York, although it is held that a contract between a municipal corporation and a water company for an adequate water supply for the extinguishment of fires is not for the direct benefit of the property owner (Wainwright v. Water Co., 78 Hun, 146; Smith v. Water Co., 82 Appellate Division, 427), yet a contract between such corporations, fixing the rate at which consumers shall be supplied, is for the benefit of the individual resident and he may sue to enjoin the collection of a higher rate. (Pond v. Water Co., 183 N. Y. 330).

In Adams v. Union R'y, 21 R. I. 134, a town had made a contract with defendant whereby defendant was not to charge a fare to exceed five cents. Plaintiff, a passenger, refused to pay more than a five cent fare and was ejected. He sued in trespass for damages for assault and battery. Upon the point as to whether the plaintiff could claim the benefit of the contract the court said: "The contract in question was made for the benefit of passengers using the defendant's cars. The town can hardly show damages for its breach, and therefore, if the people for whose benefit it was made cannot recover for its breach, no one can. True, the town might take steps to avoid the contract and stop the road for failure to perform conditions; but, in so doing, it would cut off the privileges of many to redress the wrong of one. This would neither be a reasonable nor an adequate remedy. It must have been intended to be a contract for the benefit of the public, made through the town as their corporate representative, upon which passengers could rely, and for breach of which they could seek redress; otherwise, it is a contract of little obligation and force. Suppose the defendant should charge ten cents for one ride, and should eject a passenger for refusing to pay it; under its contention, the passenger would be without redress."

leased McCloskey from his covenant, and the latter pleads that release. It asserts that the deed was never delivered, which is found to be an untruth; that the assumption clause was inserted by mistake and inadvertence, of which there is not a particle of proof; and then in further consideration of $1 formally releases the Cardinal from his covenant. This release was executed after the knowledge of the deed of McCloskey and the covenant contained in it had reached the mortgagee; after the latter had accepted and adopted it as made for his benefit and communicated that fact to the debtor by a formal demand of payment; after the mortgagee had, for three years, permitted the grantee to absorb and appropriate the rents and profits in reliance upon the covenant; and after he had commenced an action for forclosure by the issue of a summons and filing of a *lis pendens,* at a moment when the executor who released was aware that trouble was approaching, but before McCloskey was actually served or had appeared in the action.

Is this release thus executed a defence to this action? I shall not undertake to decide, if, indeed, the question is open (Knickerbocker Life Ins. Co. v. Nelson, 78 N. Y. 137; Comley v. Dazian, 114 N. Y. 161, 167), whether in the interval between the making of the contract and the acceptance and adoption of it by the mortgagee it was or was not revocable without his assent. However that may be, the only inquiry now presented is, whether it is so revocable after it has come to the knowledge of the creditor, and he has assented to it and adopted it as a security for his own benefit. My judgment leads me to answer that question in the negative.

Of course it is difficult, if not impossible, to reason about it without recurring to Lawrence v. Fox, 20 N. Y. 268, and ascertaining the principle upon which its doctrine is founded. That is a difficult task, especially for one whose doubts are only dissipated by its authority, and becomes more difficult when the number and variety of its alleged foundations are considered. But whichever of them may ultimately prevail, I am convinced that they all involve, as a logical consequence, the irrevocable character of the contract after the creditor has accepted and adopted it, and in some manner acted upon it. The prevailing opinion in that case rested the creditor's right upon the broad proposition that the promise was made for his benefit, and, therefore, he might sue upon it, although privy neither to the contract or its consideration. That view of it necessarily involves an acquisition at some moment of time of the right of action which he is permitted to enforce. If it be possible to say that he does not acquire it at the moment when the promise for his benefit is made, it must be that he obtains it when it has come to his knowledge and he has assented to and acted upon it. For he *may* sue; that is decided and conceded. If he may sue, he must, at that moment, have a vested right of action. If it was not

obtained earlier it must have vested in him at the moment when his action was commenced, so that the right and the remedy were born at the same instant. But there is no especial magic in a lawsuit. If it serves for the first time to originate the right which it seeks to enforce, it can only be because the act of bringing it shows unequivocally that the promise of the grantee has come to the knowledge of the plaintiff, that the latter has accepted and adopted it, that he intends to enforce it for his own benefit, and gives notice of that intention to the adversary. From that moment he must be assumed to act or omit to act in reliance upon it. But if all these things occur before a suit commenced, why do they not equally vest the right of action in the assignee? What more does the mere lawsuit accomplish? And so the contract between grantor and grantee, if revocable earlier, ceases to be so when by his assent to it and adoption of it the creditor brings himself into privity with it and elects to avail himself of it, and must be assumed to have governed his conduct accordingly. I see no escape from that conclusion. . . .

Judgment affirmed.[1]

9 Cyc. 386 (29–30); W. P. 274 (55); 16 H. L. R. 523.

BARNES *v.* HEKLA FIRE INSURANCE CO.

56 MINNESOTA, 38.—1893.

VANDERBURGH, J. The plaintiff demurred to the second and third defences set up in the defendant's answer, and this appeal is from the order sustaining the demurrer.

The action is brought upon a policy of insurance issued by the defendant to the plaintiff for a loss covered thereby. It is alleged, by way of defence, that subsequent to the date of plaintiff's policy the St. Paul German Insurance Company, a corporation lawfully doing business in this State, had "reinsured the said policy, and promised and agreed with the said plaintiff and this defendant to pay the plaintiff any loss which she might suffer under said policy, and said agreement was in full force and effect at the time of the pretended occurrence of the fire described in the complaint, if any such fire did occur, and that said plaintiff had always full notice and knowledge thereof." It further

[1] In Bay v. Williams, 112 Ills. 91, the court says: "The principle upon which this court has acted is that such a promise invests the person for whose use it is made with an immediate interest and right, as though the promise had been made to him. This being true, the person who procures the promise has no legal right to release or discharge the person who made the promise, from his liability to the beneficiary. Having the right, it is under the sole control of the person for whose benefit it is made—as much so as if made directly to him."

appears that thereafter, and before the commencement of this action, the St. Paul German Insurance Company duly made an assignment under the insolvency laws of the State, and that the plaintiff has duly filed and proved her claim in the insolvency proceedings for the loss indemnified against by defendant, and so assumed by the German Insurance Company. It is claimed by the defendant in this action that, by electing to proceed against the estate of the German Insurance Company, the plaintiff has effectually waived her remedy against the defendant upon the policy sued on.

It will be conceded that the agreement between the two companies set out in the answer is not merely a contract of reinsurance, but also to pay, and assume the payment of, losses of parties indemnified by policies issued by the defendant company reinsured. Reinsurance is a mere contract of indemnity, in which an insurer reinsures risks in another company. In such a contract the policy holders have no concern, are not the parties for whose benefit the contract of reinsurance is made, and they cannot, therefore, sue thereon. But the agreement alleged in this case is not a mere reinsurance of the risks by the reinsurer, but it embraces also an express agreement to assume and pay losses of the policy holder, and is therefore an agreement upon which he is entitled to maintain an action directly against the reinsurer. Johannes v. Phenix Ins. Co., 66 Wis. 50 (27 N. W. 414).

This is not, however, a case where the insurer is put to an election between his remedies against the two companies.

Unless there was a substitution of debtors, in the nature of a novation, between the three parties, upon the plaintiff's consent to the new agreement the plaintiff has not waived or lost her right of action against the defendant. A creditor is put to an election only where his remedies are inconsistent, and not where they are consistent and concurrent. In the latter case a party may prosecute as many as he has, as in the case of several debtors. And so, if, in this instance, the remedy against the insolvent company, as respects the plaintiff, was merely cumulative, there is no reason why she may not pursue either or both. As between the two companies, the defendant occupies no better position than a surety. It is not like the case of a former suit pending between the same parties. She may have an action against each at the same time, but only one satisfaction; and to this end the court may interpose by a stay when found necessary. But an action against the party primarily or originally liable in such cases may be necessary, in order to save rights under the statute of limitations, or for like reasons.

The new agreement between the companies referred to, which inured to plaintiff's benefit, lacks the essential elements of novation.

It is not alleged that it was mutually understood or agreed between the two companies that the liability of the defendant should be dis-

charged, and the new promisor should be substituted and accepted as plaintiff's debtor in the place of the defendant, or that plaintiff ever assented to or adopted any such thing.

In some few cases—notably in Rhode Island—it is held that such an agreement necessarily implies an intention to substitute the new for the original debtor, and that the creditor, in assenting to it, adopts it as a substitutional agreement. Urquhart v. Brayton, 12 R. I. 172; Wood v. Moriarty, 15 R. I. 522 (9 Atl. 427). But this, we think, is importing a stipulation into the agreement by construction which the parties have not made. It is frequently the case that the creditor consents to the arrangement as a favor, or for the convenience of his debtor; and we apprehend it would be a surprise to the parties, as well as an injustice, in many cases, if it were held to operate as a release of the original liability; and therefore it should distinctly appear, from the express terms of the agreement, or as a necessary inference from the situation of the parties, and the special circumstances of the case, that such was the intention and understanding of the parties, of which the creditor was chargeable with notice, and this is the generally accepted doctrine of the courts. 11 Amer. & Eng. Enc. Law, 889–890.

In the early case of Farley v. Cleveland, 4 Cow. 432, in which this remedy of a creditor, upon a promise for his benefit made to his debtor, upon a consideration moving from the latter, is elaborately considered, the fact of the subsisting liability of the original debtor is recognized, and held no obstacle to the right of recovery by the third party creditor, and such continued liability is generally assumed by the courts.

The exact ground upon which the direct liability to the creditor in this class of cases should be placed, appears to be left in doubt by the cases. It is called the "American doctrine," because peculiar to the courts of this country, though all do not assent to it—notably those of Massachusetts.

It is an equitable rule, adopted for convenience, and to avoid circuity of action, and the formality of an assignment by the original debtor of the new agreement with him, and is strictly in accordance with the intention of the parties to the contract in creating a liability in favor of a third party creditor. Gifford v. Corrigan, 117 N. Y. 264–265 (22 N. E. 756). The same rule of procedure is held applicable, though not uniformly, where the grantee of a mortgagor assumes in his deed to pay off the incumbrance. The mortgagee may proceed by action directly against the grantee, but the mortgagor still remains liable, and is held to occupy the relation of surety for the grantee, who, as between them, becomes the principal debtor. Thorp v. Keokuk Coal Co., 48 N. Y. 257–258; Klapworth v. Dressler, 78 Am. Dec. 76–77, note.

There is no double liability. There is no dividend as yet shown in the insolvency proceedings, and there is of course nothing to be credited

upon the plaintiff's claim. The receipt of a dividend would only operate as a *pro tanto* satisfaction; and if defendant is required to pay before the dividend, it will be entitled to it, and may be subrogated to the rights of plaintiff therein, so that there need be no embarrassment in adjusting the rights of the parties.

Other questions in the case do not, we think, demand any discussion. Order affirmed.[1]

9 Cyc. 380 (9); W. P. 271 (46–47).

[1] *Contracts under seal.*—"It is settled in this State that an agreement made on a valid consideration, by one with another, to pay money to a third, can be enforced by the third in his own name. Lawrence v. Fox, 20 N. Y. 268; Secor v. Lord, 3 Keyes, 525. And though a distinction has sometimes been made in favor of a simple contract (Hall v. Marston, 17 Mass. 575; D. & H. Canal Co. v. W. Co. Bank, 4 Den. 97), it is now held that when the agreement is in writing, and under seal, the same rule prevails. Van Schaick v. Third Ave. R. R., 38 N. Y. 346; Ricard v. Sanderson, 2 Hand, 179."—Coster v. City of Albany, 43 N. Y. 399. But see Case v. Case, 203 N. Y. 263.

Contra, Fairchild v. Mutual Life Assoc., 51 Vt. 613, an action by a beneficiary upon a life insurance policy under seal. The court said: "In deciding who is the proper party to bring covenant broken on that policy, it is not material that the covenant is for the benefit of a third person. The law is well settled that upon instruments under seal suit must be brought by the covenantee; and although the instrument may be expressed to be for the benefit of a third person, there is not sufficient privity in law between such third person and the covenantor to enable him to maintain an action." See 9 Cyc. 385–386 (25–27); W. P. 276 (61); 25 H. L. R. 386.

Right of beneficiary derivative.—"It is said that the action can be sustained upon the doctrine of Lawrence v. Fox, 20 N. Y. 268, and kindred cases. But I know of no authority to support the proposition that a person not a party to the promise, but for whose benefit the promise is made, can maintain an action to enforce the promise where the promise is void as between the promisor and promisee, for fraud, or want of consideration, or failure of consideration. It would be strange, I think, if such an adjudication should be found. The party suing upon the promise in cases like Lawrence v. Fox, is in truth asserting a derivative right. . . . There is no justice in holding that an action on such a promise is not subject to the equities between the original parties springing out of the transaction or contract between them. It may be true that the promise cannot be released or discharged by the promisee, after the rights of the party for whose benefit it is said to have been made have attached. But it would be contrary to justice or good sense to hold that one who comes in by what Allen, J., in Vrooman v. Turner, calls 'the privity of substitution,' should acquire a better right against the promisor than the promisee himself had."—Dunning v. Leavitt, 85 N. Y. 30.

CHAPTER II.

The Assignment of Contract.

Assignment by act of the parties.

(i.) Assignment of liabilities.

ARKANSAS VALLEY SMELTING CO. *v.* BELDEN MINING CO.

127 UNITED STATES, 379.—1888.

Action for damages for breach of contract. Demurrer to complaint sustained. Plaintiff brings error.

Defendants contracted with Billing and Eilers to sell and deliver to them 10,000 tons of carbonated lead ore at the rate of 50 tons a day, on condition that "all ore so delivered shall at once, upon the delivery thereof, become the property of the second party." The ore after delivery was to be sampled and assayed in lots of about 100 tons each, the price to be fixed in accordance with the state of the New York market on the day of the delivery of samples. Defendants delivered some ore to Billing and Eilers under this contract, when the firm was dissolved and the business, together with the above contract, assigned to G. Billing, to whom defendants continued to deliver ore. The business, together with the above contract, was then assigned by G. Billing to plaintiff, who notified defendant of the fact. Defendant refused to deliver to plaintiff and notified plaintiff that it considered the contract canceled and annulled.

Gray, J. If the assignment to the plaintiff of the contract sued on was valid, the plaintiff is the real party in interest, and as such entitled, under the practice in Colorado, to maintain this action in its own name. Rev. Stat. § 914; Colorado Code of Civil Procedure, § 3; Albany & Rensselaer Co. v. Lundberg, 121 U. S. 451. The vital question in the case, therefore, is whether the contract between the defendant and Billing and Eilers was assignable by the latter, under the circumstances stated in the complaint.

At the present day, no doubt, an agreement to pay money, or to deliver goods, may be assigned by the person to whom the money is to be paid or the goods are to be delivered, if there is nothing in the terms of the contract, whether by requiring something to be afterwards done by him, or by some other stipulation, which manifests the intention of the parties that it shall not be assignable.

But every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, "you have the right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract." Humble v. Hunter, 12 Q. B. 310, 317; Winchester v. Howard, 97 Mass. 303, 305; Boston Ice Co. v. Potter, 123 Mass. 28; King v. Batterson, 13 R. I. 117, 120; Lansden v. McCarthy, 45 Missouri, 106. The rule upon this subject, as applicable to the case at bar, is well expressed in a recent English treatise. "Rights arising out of contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided." Pollock on Contracts (4th ed.), 425.

The contract here sued on was one by which the defendant agreed to deliver ten thousand tons of lead ore from its mines to Billing and Eilers at their smelting works. The ore was to be delivered at the rate of fifty tons a day, and it was expressly agreed that it should become the property of Billing and Eilers as soon as delivered. The price was not fixed by the contract, or payable upon the delivery of the ore. But as often as a hundred tons of ore had been delivered, the ore was to be assayed by the parties or one of them, and, if they could not agree, by an umpire; and it was only after all this had been done, and according to the result of the assay, and the proportions of lead, silver, silica, and iron, thereby proved to be in the ore, that the price was to be ascertained and paid. During the time that must elapse between the delivery of the ore and the ascertainment and payment of the price, the defendant had no security for its payment, except in the character and solvency of Billing and Eilers. The defendant, therefore, could not be compelled to accept the liability of any other person or corporation as a substitute for the liability of those with whom it had contracted.

The fact that upon the dissolution of the firm of Billing and Eilers, and the transfer by Eilers to Billing of this contract, together with the smelting works and business of the partnership, the defendant continued to deliver ore to Billing according to the contract, did not oblige the defendant to deliver ore to a stranger, to whom Billing had undertaken, without the defendant's consent, to assign the contract. The change in a partnership by the coming in or the withdrawal of a partner might perhaps be held to be within the contemplation of the parties originally contracting; but, however that may be, an assent to such a change in the one party cannot estop the other to deny the validity of a subsequent assignment of the whole contract to a stranger. The technical rule of law, recognized in Murray v. Harway (56 N. Y. 337), cited for the plaintiff, by which a lessee's express

covenant not to assign has been held to be wholly determined by one assignment with the lessor's consent, has no application to this case.

The cause of action set forth in the complaint is not for any failure to deliver ore to Billing before his assignment to the plaintiff (which might perhaps be an assignable chose in action), but it is for a refusal to deliver ore to the plaintiff since this assignment. Performance and readiness to perform by the plaintiff and its assignors, during the periods for which they respectively held the contract, is all that is alleged; there is no allegation that Billing is ready to pay for any ore delivered to the plaintiff. In short, the plaintiff undertakes to step into the shoes of Billing, and to substitute its liability for his. The defendant had a perfect right to decline to assent to this, and to refuse to recognize a party, with whom it had never contracted, as entitled to demand further deliveries of ore.

The cases cited in the careful brief of the plaintiff's counsel, as tending to support this action, are distinguishable from the case at bar, and the principal ones may be classified as follows:

First. Cases of agreements to sell and deliver goods for a fixed price, payable in cash on delivery, in which the owner would receive the price at the time of parting with his property, nothing further would remain to be done by the purchaser, and the rights of the seller could not be affected by the question whether the price was paid by the person with whom he originally contracted or by an assignee. Sears v. Conover, 3 Keyes, 113, and 4 Abbot (N. Y. App.), 179; Tyler v. Barrows, 6 Robertson (N. Y.), 104.

Second. Cases upon the question how far executors succeed to rights and liabilities under a contract of their testator. Hambly v. Trott, Cowper, 371, 375; Wentworth v. Cock, 10 Ad. & El. 42, and 2 Per. & Dav. 251; Williams on Executors (7th ed.), 1723–1725. Assignment by operation of law, as in the case of an executor, is quite different from assignment by act of the party; and the one might be held to have been in the contemplation of the parties to this contract, although the other was not. A lease, for instance, even if containing an express covenant against assignment by the lessee, passes to his executor. And it is by no means clear that an executor would be bound to perform, or would be entitled to the benefit of, such a contract as that now in question. Dickinson v. Calahan, 19 Penn. St. 227.

Third. Cases of assignments by contractors for public works, in which the contracts, and the statutes under which they were made, were held to permit all persons to bid for the contracts, and to execute them through third persons. Taylor v. Palmer, 31 California, 240, 247; St. Louis v. Clemens, 42 Missouri, 69; Philadelphia v. Lockhardt, 73 Penn. St. 211; Devlin v. New York, 63 N. Y. 8.

Fourth. Other cases of contracts assigned by the party who was

to do certain work, not by the party who was to pay for it, and in which the question was whether the work was of such a nature that it was intended to be performed by the original contractor only. Robson v. Drummond, 2 B. & Ad. 303; British Waggon Co. v. Lea, 5 Q. B. D. 149; Parsons v. Woodward, 2 Zabriskie, 196.

Without considering whether all the cases cited were well decided, it is sufficient to say that none of them can control the decision of the present case. Judgment affirmed.[1]

4 Cyc. 22-23 (42-44); 20 H. L. R. 423; 4 C. L. R. 70; Woodward, Assignability of contract, 18 H. L. R. 23.

COCHRAN, D. J., IN AMERICAN BONDING CO. *v.* BALTIMORE & O. S. W. R. R.

124 FEDERAL REPORTER, 866.—1903.

In Pollock on Contracts, p. 201, it is stated that the origin of the rule that the benefit of a contract—*i. e.*, the right of one party thereto to have the other perform an obligation on his part arising therefrom—could not be assigned at common law, so as to enable the assignee to sue in his own name for a breach thereof, was attributed by Coke to the "wisdom and policy of the founders of our law" in discouraging maintenance and litigation. In opposition to this the author states:

"But there can be little or no doubt that it was in truth a logical consequence of the primitive view of a contract as creating a strictly personal obligation between the creditor and the debtor."

According to this conception of a contract, the relation created by it cannot be severed by either party thereto, the creditor or debtor, without the consent of the other. It is as impossible for either to substitute another in his place as it is for him to change any other term of the contract. This primitive view of a contract prevails no longer. The treatment by courts of equity of such assignments, the judicial cognizance by courts of law of the usage of merchants in relation to bills of exchange rendering it a part of the common law, the

[1] "A contract to pay money may doubtless be assigned by the person to whom the money is payable, if there is nothing in the terms of the contract which manifests the intention of the parties to it that it shall not be assignable. But where rights arising out of contract are coupled with obligations to be performed by the contractor, and involve such a relation of personal confidence that it must have been intended that the rights should be exercised and the obligations performed by him alone, the contract, including both his rights and his obligations, cannot be assigned without the consent of the other party to the original contract."—Delaware County v. Diebold Co., 133 U. S. 473.

passage of statutes making certain contracts assignable, the construction placed upon the statutes enacted in numerous jurisdictions requiring actions to be brought in the name of the real party in interest, and the conception of such rights as property and the possession thereof as ownership, account for its passing away. But, notwithstanding this, it is still possible that a certain contract may create such a relation between the parties thereto—a relation that cannot be severed by the creditor assigning to another his right to have the debtor perform his obligation. It will do so if it contains an express stipulation prohibiting such an assignment. In the case of Devlin v. Mayor, etc., of New York, 63 N. Y. 8, Judge Allen said: "Parties may, in terms, prohibit the assignment of any contract, and declare that neither personal representatives nor assignees shall succeed to any right in virtue of it, or be bound by its obligations." . . . .

It will also do it if it is a bilateral contract, and the counter obligation on the part of the creditor to the debtor is of such a nature that the reasonable inference therefrom is that it was the intention of the parties that it should be performed by the creditor, and no one else. Perhaps a more careful statement would be that in such a case the right cannot be assigned so as to compel the debtor to accept performance of that obligation from the assignee, and, if an attempt is made to so assign it, the assignment will be invalid. It is so stated in Bishop on Contracts, § 1182, where he says: "An agreement involving personal trust in the party, or to be carried out by his personal skill, cannot be so assigned as to compel the other party to accept performance by the assignee, and pay him therefor." If the rule here goes no further than this, there is nothing in the existence of such a counter obligation to prevent an assignment by a creditor of his right after he has performed that obligation, and thus perfected his right, or, even before, if no attempt is made to shift the duty of performing it from himself to the assignee. Instances of where the counter obligation involved personal skill on the part of the creditor, and because of this it was held that the reasonable inference was that it was the intention of the parties that it be performed by him alone, and therefore he could not assign his right to another so as to compel the debtor to accept performance from the assignee, may be found in the recent cases of Sloan v. Williams, 138 Ill. 43, 27 N. E. 531, 12 L. R. A. 496; Edison v. Babka, 111 Mich. 235, 69 N. W. 499; Eastern Advertising Co. v. McGaw, 89 Md. 72, 42 Atl. 923. An instance of where it involved personal credit, and the same significance and effect was given to it, may be found in the case of Arkansas Valley Smelting Co. v. Belding Mining Co. (127 U. S. 379).

4 Cyc. 22–23 (42–44).

ROCHESTER LANTERN CO. *v.* STILES AND PARKER PRESS CO.

135 NEW YORK, 209.—1892.

Action for damages for alleged breach of contract. Judgment for plaintiff affirmed at General Term. Defendant appeals.

EARL, C. J. . . . In disposing of this case, we must take the facts as found by the referee, and they are as follows:

On the 19th day of March, 1887, James H. Kelly entered into a contract with the defendant whereby it was to make and deliver to him certain dies to be used by him in the manufacture of lanterns; that it agreed to make and deliver the dies within a reasonable time, that is, within five weeks from the time of the order, to manufacture and deliver the same; that the plaintiff was incorporated shortly prior to the 27th day of August, 1887, and on the twenty-ninth day of that month Kelly duly assigned to the plaintiff his contract with the defendant, and all his rights and claims thereunder; that the plaintiff failed to establish by evidence that at or prior to the time of making the contract, the defendant was informed that any corporation was intended to be organized, or that the contract was made for the use or benefit of any other person or corporation than Kelly; that the first notification received by the defendant that the plaintiff had any interest in the contract, or that such a corporation as the plaintiff existed, so far as was proven upon the trial, was given to it by a letter dated March 22, 1888, and signed "Rochester Lantern Company, by James H. Kelly, President"; that from time to time after making the contract samples were sent by Kelly to the defendant and dies were shipped to him by the defendant; that the last sample for the last die to be made was sent by Kelly to the defendant on the 29th day of July, 1887; that by the conduct of Kelly and the defendant performance of the contract within the time originally stipulated was waived, and the contract except as to time of performance was regarded as still in force at the date of the assignment thereof; that a reasonable time in which the defendant could have carried out and performed the contract after August 29, 1889, was five weeks, which expired October third; that Kelly was a manufacturer of lanterns in Rochester and required the dies for the manufacture of lanterns which he designed to put upon the market as the defendant was informed and well knew, and that the plaintiff after its incorporation succeeded him in the business of manufacturing lanterns; that the defendant failed to carry out the contract and to furnish dies as thereby required; that the plaintiff, for the sole purpose of carrying on the business of manufacturing the lanterns which it was intended that these dies should make, entered into certain obligations and incurred certain liabilities as follows: It paid one Butts for rent of room from October 3 to November 1, 1887, the sum of $31.86; it paid one Broad, an employé, for his wages from October 3, 1887, to March 24, 1888, the sum of $250; and one Briston, an employé, for his wages during the same time the same sum; it paid to Crouch & Sons for the rent of premises from November 1, 1887, to March 24, 1888, $278.46; that by reason of defendant's failure to perform the contract as agreed by it the plaintiff was unable to manufacture any lanterns for the market until after the commencement of this action on the 24th day of March, 1888, and that the plaintiff by reason of such failure sustained loss in the sums above mentioned which it actually paid,

and the referee awarded judgment for the amount of the items above specified.

We do not think these facts sufficient to justify the recovery of the items of damages specified. There had been no breach of the contract at the time of the assignment thereof to the plaintiff, and at that time Kelly had no claim against the defendant for damages. After the assignment Kelly had no interest in the contract and the defendant owed him no duty and could come under no obligation to him for damages on account of a breach of the contract by it.

There is no doubt that Kelly could assign this contract as he could have assigned any other chose in action, and by the assignment the assignee became entitled to all the benefits of the contract. Devlin v. Mayor &c., 63 N. Y. 8. The contract was not purely personal in the sense that Kelly was bound to perform in person, as his only obligation was to pay for the dies when delivered, and that obligation could be discharged by any one. He could not, however, by the assignment, absolve himself from all obligations under the contract. The obligations of the contract still rested upon him, and resort could still be made to him for the payment of the dies in case the assignee did not pay for them when tendered to it. After the assignment of the contract to the plaintiff the defendant's obligation to perform still remained, and that obligation was due to the plaintiff, and for a breach of the obligation it became entitled to some damages, and so we are brought to the measure of damages in such a case as this.[1]

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[1] "We have not overlooked the distinction pointed out by counsel between executory contracts and contracts which have been executed on one side. What we have said applies where something remains to be done by the party who assigns. And as a matter of course (since a party cannot release himself from an obligation by his own act without the consent of the other party), it is only the benefit of a contract which can be assigned. Where there is a burden, it cannot be transferred without the consent of the other party. Civ. Code, sec. 1457."—Hayne, C., in La Rue v. Groezinger, 84 Cal. 281.

"When the contract is executory in its nature, and an assignee or personal representative can fairly and sufficiently execute all that the original contractor could have done, the assignee or representative may do so and have the benefit of the contract. . . . In principle it would not impair the rights of the assignee, or destroy the assignable quality of the contract or claim, that the assignee, as between himself and the assignor, has assumed some duty in performing the conditions precedent to a perfected cause of action, or is made the agent or substitute of the assignor in the performance of the contract. If the service to be rendered or the condition to be performed is not necessarily personal, and such as can only with due regard to the intent of the parties, and the rights of the adverse party, be rendered or performed by the original contracting party, and the latter has not disqualified himself from the performance of the contract, the mere fact that the individual representing and acting for him is the assignee, and not a mere agent or

It is frequently difficult in the administration of the law to apply the proper rule of damages, and the decisions upon the subject are not harmonious. The cardinal rule undoubtedly is that the one party shall recover all the damage which has been occasioned by the breach of the contract by the other party. But this rule is modified in its application by two others: The damages must flow directly and naturally from the breach of the contract, and they must be certain, both in their nature and in respect of the cause from which they proceeded. Under this latter rule speculative, contingent, and remote damages which cannot be directly traced to the breach complained of are excluded. Under the former rule such damages only are allowed as the parties may fairly be supposed when they made the contract to have contemplated as naturally following its violation. Hadley v. Baxendale, 9 Excheq. 341; Griffin v. Colver, 16 N. Y. 489; Leonard v. N. Y. &c. Tel. Co., 41 Id. 544, 566; Cassidy v. Le Fevre, 45 Id. 562.

The natural and obvious consequence of a breach of this contract on the part of the defendant would be to compel Kelly or his assignee to procure the dies from some other manufacturer, and the increased cost of the dies, if any, would be the natural and ordinary measure of the damages; and such would be the damages which it could be fairly supposed the parties expected, when they made the contract, would flow from a breach thereof. It does not appear that Kelly was engaged in the manufacture of lanterns when the contract was made, or that he contemplated engaging in the business until dies were furnished. No fact is found showing that the defendant had any reason to suppose that he would hire any workmen or persons before the dies were furnished, and it cannot be said that it was a natural and proximate consequence of a breach of the contract that he would have idle men or unused real estate causing him the expenses now claimed. Much less can it be supposed that the defendant could, when the contract was made, anticipate that the contract would be assigned and that the assignee would employ men and premises to remain idle after the defendant had failed to perform the contract and in consequence of such failure. Such damages to the assignee could not have been contemplated as the natural and proximate consequence of a breach of the contract. If we should adopt the rule of damages contended for by the plaintiff, what would be the limits of its application? Suppose instead of employing two men, the plaintiff had projected an extensive business in which the dies were to be used, and had em-

servant, will not operate as a recission of, or constitute a cause for, terminating the contract. Whether the agent for performing the contract acts under a naked power, or a power coupled with an interest, cannot affect the character or vary the effect of the delegation of power by the original contractor."—Allen, J., in Devlin v. Mayor, 63 N. Y. 8, 17–18, 15–16.

ployed one hundred men, and had hired or even constructed a large and costly building in which to carry on the business, and had kept the men and the building unemployed for months, and, perhaps, years, could the whole expense of the men and building be visited on the defendant as a consequence of its breach of contract? If it could, we should have a rule of damages which might cause ruin to parties unable from unforeseen events to perform their contracts.

The damages allowed by the referee in this case are special damages, not flowing naturally from the breach of the contract, and, we think, the only damages such an assignee in a case like this can recover is the difference between the contract price of these dies and the value or cost of the dies if furnished according to the contract. Even if Kelly could have recovered special damages, we see no ground for holding that his assignee, of whose connection with the contract the defendant had no notice, could recover special damages not contemplated when the contract was made.

We are, therefore, of opinion that the award of damages made by this judgment was not justified by the facts found, and that the judgment should be reversed and a new trial granted, costs to abide event. All concur.

Judgment reversed.[1]

4 Cyc. 20 (38); W. P. 595 (46).

NEW YORK BANK NOTE CO. *v.* THE HAMILTON BANK NOTE CO. AND KIDDER PRESS CO.

180 NEW YORK, 280.—1905.

The Kidder Press Co., a corporation engaged in manufacturing presses for printing, numbering and perforating strip tickets, entered into a contract with the plaintiff's assignor, the New York Bank Note Co., which was a printing company, incorporated under the laws of New Jersey. The contract provided that all future sales of the presses

[1] In Liberty Wall Paper Co. v. Stoner Wall Paper Co., 59 N. Y. Appellate Div. 353, affirmed 170 N. Y. 582, a contract between plaintiff and Stoner to sell Stoner paper hangings was held assignable by Stoner to the defendant company *although a period of credit was given to Stoner* by the contract, i. e., that Stoner should settle all bills within 30 days from shipment. The court said: "The contract is not a personal one in the sense that Stoner was bound to perform in person. Stoner had a right to assign the contract, or in case of his death his executors or administrators would have succeeded to his rights and liabilities under the contract. The obligations of Stoner under the contract could have been discharged by any one. If the assignment was made without the consent of the plaintiff, the obligations of the contract would still have rested upon Stoner, and resort could have been had to him for the fulfillment of the contract if the same had not been carried out and discharged by his assignee."

should be made to and through the printing company, which should have the right to lease the presses to purchasers thereof under a perpetual lease, the price of the presses to be collected by the printing company and paid by it to the press company. The press company further agreed not to attach the numbering and perforating devices to any press previously manufactured and sold, the object of the contract being to prevent any competitor from obtaining or using any press built by the press company with the numbering and perforating attachments, or which could be used for printing strip tickets of form, design or purpose similar to those printed or that might be printed by the printing company. The printing company later, and without the consent of the press company, assigned the contract to another corporation, likewise named the New York Bank Note Company, but organized and incorporated under the laws of West Virginia, for the purpose of taking over the business, property and contracts of the New Jersey corporation, which, after assigning all its property and contracts to its successor, was dissolved. After the dissolution of plaintiff's assignor (the New Jersey corporation) the press company furnished the strip ticket attachments to the Hamilton Bank Note Co. and also delivered to it, a press with attachments complete. The assignee, the New York Bank Note Co. of West Virginia, here sues the Kidder Press Co. and the Hamilton Bank Note Co., praying an injunction and damages.

CULLEN, C. J. . . . The appellants first claim that the contract between the Kidder Company and the plaintiff's predecessor was personal and not the subject of assignment. This claim was fully discussed by the Appellate Division on the appeal from the interlocutory judgment. (28 App. Div. 411.) It was there held by a divided court that the assignment to the plaintiff was effectual. Doubtless, the general rule is that an executory contract not necessarily personal in its character, which can, consistent with the rights and interests of the adverse party, be sufficiently executed by the assignee, is assignable in the absence of agreement in the contract. (Devlin v. Mayor, etc., of N. Y., 63 N. Y. 8; New England Iron Company v. Gilbert Elevated R. R. Co., 91 N. Y. 153; Rochester Lantern Co. v. Stiles & Parker Press Co., 135 N. Y. 209.) So an agreement by a vendor on a sale of a business and its good will not to enter into a similar business at the same place during a specified period may be assigned by the vendee on a subsequent sale of the business by him. (Francisco v. Smith, 143 N. Y. 488.) Therefore, the objection to the assignment of this contract does not lie in that feature. It lies, if at all, in those provisions of the contract which prescribe that the title to all presses manufactured by the Kidder Company for third parties shall be transferred to the New York Company and the presses leased by that company under restrictions as to their use, the New York Company to

collect from such third parties the purchase price of the presses and account for the same to the Kidder Company. Judge Patterson, writing for the minority of the court, thought these provisions constituted a contract of agency and that the contract was not assignable because it involved the duties of agency. Judge O'Brien, for the majority of the court, while holding that under the contract the purchase price for the machines sold to third parties was to be collected in the first instance by the New York Company, which was to account therefor to the Kidder Company, and while admitting the general rule that rights arising out of a contract cannot be transferred if they are coupled with liabilities (Arkansas Smelting Co. v. Belden Mining Co., 127 U. S. 379), thought that the general doctrine did not apply to this particular case. He said there was no substantial substitution of parties. "Technically, the contract was assigned; but practically, it was not. The assignment was part of the reorganization, and but a means to that end. With it were assigned all the property and choses in action of the original company, with the exception of one designated claim. The stock of the new company was distributed ratably among the stockholders of the old. Technically, the new company was a distinct legal entity from the old; but to all intents and purposes it was the same concern. . . . The risk of such changes is assumed by every one who contracts with a corporation. . . . To hold that it was an 'assignee' of the contract, within the meaning of the rule relied upon, is to regard the form and disregard the substance." From this we wholly dissent. The plaintiff was not only technically but substantially a different entity from its predecessor. It is true that in dealing with corporations a party cannot rely on what may be termed the human equation in the company; the personnel of the stockholders and officers of the company may entirely change. But though there is no personal or human equation in the management of a corporation there is a legal equation which may be of the utmost importance to parties contracting with it. In dealing with natural persons in matters of trust and confidence personal character is, or may be, a dominant factor. In similar transactions with a corporation, a substitute for personal character is the charter rights of the corporation, the limits placed on its power, especially to incur debt, the statutory liability of its officers and stockholders. These are matters of great importance when, as at present, many States and territories seem to have entered into the keenest competition in granting charters, each seeking to outbid the other by offering to directors and stockholders the greatest immunity from liability at the lowest cash price. The defendant, the Kidder Company, could not be obliged to intrust its money, collected on the sale of the presses, to the responsibility of an entirely different corporation from that with which it had contracted, and we hold that the contract could not be assigned to the plaintiff

without the assent of the other party to it. [The court then holds further that the original contract was not void as in restraint of trade, and also discusses the measure of damages.]

4 Cyc. 22 (43); W. P. 595 (46).

HAYES *v.* WILLIO.

4 DALY, 259.—1872.

(*New York Common Pleas.*)

Injunction to restrain defendant from playing at any other theater than the plaintiff's. Motion to vacate injunction denied. Defendant appeals. Also, appeal from an order denying a motion to vacate a writ of *ne exeat* against the defendant.

K. engaged defendant to appear as a contortionist, bird imitator, and pantomimist under K.'s personal control at such places as K. might direct. K. assigned the contract to plaintiff.

ROBINSON, J. . . . As a general rule, a contract for the performance of personal duties or services is unassignable, so as to vest in the assignee the right to compel its execution. Ch. on Cont. 739; Burrill on Assignments, 67, and cases cited, note 3. As to slaves it is different; but as to apprentices, an assignment of their indentures merely operates as a covenant that they shall serve the assignees (Nickerson v. Howard, 19 Johns. 113), except as to the indenture of an infant immigrant to pay his passage, as authorized by 2 R. S. 156, §§ 12, 13, 14; and as to convicts, the right of control still remains in the officer of the State. Horner v. Wood, 23 N. Y. 350.

These considerations do not appear to have been presented on the motion for the orders for the injunction and *ne exeat,* now under review; they are controlling as to the merits of this controversy, and without discussing the other questions presented on the argument and in the opinion of the judge who granted the orders, these orders should be reversed, with costs, and the *ne exeat* superseded and discharged.

Order reversed.

4 Cyc. 22-23 (43-44).

(*ii.*) *Assignment of rights.*

a. At common law.

HEATON *v.* ANGIER.

7 NEW HAMPSHIRE, 397.—1835.

Assumpsit for a wagon sold and delivered. Verdict for plaintiff, subject to the opinion of the court upon the following case.

The plaintiff, on the 29th of March, 1832, sold the wagon to the defendant at auction for $30.25. Immediately afterwards, on the same day, one John Chase bought the wagon of the defendant for $31.25. Chase and the defendant then went to plaintiff, and Chase agreed to pay the $30.25 to the plaintiff for the defendant, and the plaintiff agreed to take Chase as paymaster for that sum; and thereupon Chase took the wagon and went away.

GREEN, J. In Tatlock v. Harris (3 D. & E. 180), Buller, J., said: "Suppose A owes B £100, and B owes C £100, and the three meet and it is agreed between them that A shall pay C the £100, B's debt is extinguished, and C may recover the sum from A."

The case thus put by Buller is the very case now before us. Heaton, Angier, and Chase being together, it was agreed between them that the plaintiff should take Chase as his debtor for the sum due from the defendant. The debt due to the plaintiff from the defendant was thus extinguished. It was an accord executed. And Chase, by assuming the debt due to the plaintiff, must be considered as having paid that amount to the defendant, as part of the price he was to pay the defendant for the wagon.

The agreement of the plaintiff to take Chase as his debtor was clearly a discharge of the defendant. Wilson v. Coupland, 5 B. & A. 228; Wharton v. Walker, 4 B. & C. 163; Cuxon v. Chadley, 3 B. & C. 591.

A new trial granted.

29 Cyc. 1136 (38).

McKINNEY *v.* ALVIS.

14 ILLINOIS, 33.—1852.

Action for the value of certain rails. Judgment for plaintiff.

TRUMBULL, J. One Piper, since deceased, had a claim on McKinney for eight hundred rails, which Alvis, under a claim of purchase from Piper, called on McKinney to pay to him. McKinney agreed to deliver the rails to Alvis, but failing to comply with his contract, Alvis sued to recover their value.

The important question in this case, and the only one we deem it necessary to notice is, can Alvis maintain the action in his own name?

It is a general rule that choses in action, except negotiable instruments, are not assignable at law so as to authorize the assignee to maintain an action in his own name; but it is insisted that an express promise, as in this case, to pay the debt to the assignee, forms an exception to the rule. To constitute an exception, however, in a case like this, requires something more than a mere promise on the part of the debtor to pay to the assignee; there must be a communication, and a new arrangement between all the parties, by which the assignor's

claim upon his debtor, and his liability to the assignee, are extinguished. In this case there was no communication between Piper and McKinney; nor did Alvis agree to release Piper, and look alone to McKinney for the debt. It is not like the case put in the books, where it is said: "Suppose A owes B £100, and B owes C £100, and the three meet, and it is agreed between them that A shall pay C the £100, B's debt is extinguished, and C may recover that sum against A." Chitty on Contracts, 482, 613; Wharton v. Walker, 4 Barnwell & Cresswell, 163; Butterfield v. Hartshorn, 7 N. H. 345. Nor is it a case where one person can be said to have withheld the money of another, and thereby subjected himself to an action at the suit of the latter for money had and received; but it is an attempt to maintain an action in his own name, by the assignee of a contract for the delivery of certain articles of personal property, on the ground alone of an express parol promise by the debtor to pay the property to him. No consideration for the promise is shown by the record, for it does not appear that the defendant was released by it from his liability to Piper, nor is there any legitimate evidence in the record of a transfer of the claim by Piper to Alvis.

Judgment reversed, and cause remanded.

4 Cyc. 7 (7).

COMPTON *v.* JONES.

4 COWEN (N. Y.), 13.—1825.

Assumpsit. Demurrer to declaration overruled.

Defendant made a bond to one Wood, promising to pay Wood a certain sum. Wood afterward assigned the bond to the plaintiff. Plaintiff gave notice of the assignment to defendant, who promised to pay the amount to plaintiff.

SAVAGE, C. J., remarked, that what was said by the court in the authority cited by the defendant's counsel, was intended of a case where the action was brought by the party to the specialty. And the whole court were clear that the action was sustainable, being on a promise to the assignee.

Judgment for the plaintiff.

4 Cyc. 92 (45); 96-98 (62-67).

JESSEL *v.* WILLIAMSBURGH INS. CO.

3 HILL (N. Y.), 88.—1842.

Assumpsit on a fire insurance policy. Plaintiff nonsuited, and judgment for defendants.

The policy was issued to S. and contained a provision that it should

not be assignable without the consent of the company. The company gave their consent to the assignment to plaintiff.

Per Curiam. We know of no principle upon which the assignee of a policy of insurance can be allowed to sue upon it in his own name. The general rule applicable to personal contracts is, that, if assigned, the action for a breach must be brought in the name of the assignor, except where the defendant has expressly promised the assignee to respond to him. Compton v. Jones, 4 Cowen, 13; 1 Chitty's Plead. 9, 10; Innes v. Dunlop, 8 Term Rep. 595; Currier v. Hodgdon, 3 N. H. 82; Wiggin v. Damrell, 4 Id. 69; Skinner v. Somes, 14 Mass. 107; Mowry v. Todd, 12 Id. 281; Crocker v. Whitney, 10 Id. 316; Dubois v. Doubleday, 9 Wend. 317; and see Chit. on Cont. 614, note 1, 5th Am. ed. In Granger v. The Howard Insurance Company (5 Wend. 200, 202) the point now raised was discussed, and, we think, decided against the present plaintiff. The argument that the policy in question originally contemplated an assignment, would be equally cogent in all cases, for aught we see, of a promise in form to one *and his assigns;* and yet it is settled that the latter words do not impart a negotiable quality to the promise so as to enable the assignee to sue upon it in his own name. Skinner v. Somes, 14 Mass. 107–8. The judgment below is clearly right and should not be disturbed.

Judgment affirmed.

HOUGH *v.* BARTON.

20 VERMONT, 455.—1848.

Indebitatus assumpsit for money had and received. Verdict for plaintiff. Exceptions by defendant.

Defendant made and delivered a note to Hough, which was by him transferred to K., and by K. to Barker, who was the real party in interest in this suit. The note was lost, and defendant offered to prove that, after its transfer to Barker, Hough, the nominal plaintiff, had admitted that it was a negotiable note. This evidence was excluded.

DAVIS, J. It was conceded on trial that Barker was the owner of the note given by the defendant to Hough, and that the suit was commenced and prosecuted by him, for his own benefit, though in the name of the payee. Although the language of the record is not perfectly explicit on this subject, it may reasonably be inferred, that, at the time of bringing the action, and before, the defendant was apprised of the transfer to Kidder, and afterwards by him to Barker. Under such circumstances, although a different rule prevails in England, yet in this State and in most of the American States, it is regarded as inequitable and unjust to permit the defendant to avail himself of any discharge, release, *retraxit,* or admission, by the nominal plain-

tiff, to defeat the action. It was not competent for Hough to make admissions, after suit brought, to prejudice the rights of the real party in interest. Sargeant v. Sargeant *et al.*, 18 Vt. 371; Cow. and Hill's notes to Phil. Ev. 172; 1 Greenl. Ev.§ 172-3, and note (2). . . .

In this very case, so far as appears, the note was neither payable to order, or bearer, and yet Barker, by reason of the blank indorsement, obtained a legal right to collect and appropriate the contents to his own exclusive use,—not, it is true, by a suit in his own name, but by using the name of Hough for that purpose. To this Hough consented; but the right would have been the same, had there been no consent. Having transferred the note for value, his consent to the use of his name, on proper indemnity against costs, results by implication; and, as a necessary consequence, he is rendered incapable of impairing that right by discharge, release, or other act. . . .

The judgment of the county court is therefore affirmed.[1]

4 Cyc. 93-94 (47-48); 16 Cyc. 994 (45); 996 (61).

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b. In equity.

CARTER *et al. v.* UNITED INS. CO.

1 JOHNSON'S CHANCERY (N. Y.), 463.—1815.

Bill in equity by plaintiffs as assignees of an insurance policy. Demurrer to bill on the ground that the plaintiffs had an adequate remedy at law.

The policy was issued to Titus & Gibbs on 500 barrels of flour from Newport to St. Jago de Cuba on board the Spanish brig Patriota, which was captured by a Carthagena privateer. Titus & Gibbs assigned the policy to the plaintiffs in trust for creditors. Defendants refused to pay the loss.

THE CHANCELLOR. The demand is properly cognizable at law, and there is no good reason for coming into this court to recover on the contract of insurance. The plaintiffs are entitled to make use of

[1] "The general principle deducible from the cases from the ordinary practice is that when one person has an equitable right or claim against another, which he can obtain only by a suit in the name of a third person, he may use the name of that person in an action to enforce his right. And such third person cannot control the suit, nor will his admission, subsequent to the time he ceased to have an interest, be evidence to defeat it. Eastman v. Wright, 6 Pick. 322; Jones v. Witter, 13 Mass. 304; Hackett v. Martin, 8 Greenl. 77; Matthews v. Houghton, 1 Fairf. 420; Frear v. Evertson, 20 Johns. 142. But the holder must furnish to the plaintiff on the record ample indemnity against costs, if required."—Parker, C. J., in Webb v. Steele, 13 N. H. 230, 236. See also Halloran v. Whitcomb, 43 Vt. 306; Fay v. Guynon, 131 Mass. 31; Dazey v. Mills, 5 Gilm. (Ill.) 67.

the names of Gibbs & Titus, the original assured, in the suit at law; and the nominal plaintiffs would not be permitted to defeat or prejudice the right of action. It may be said here, as was said by the chancellor in the analogous case of Dhegetoft v. The London Assurance Company (Mosely, 83), that, at this rate, all policies of insurance would be tried in this court. In that case the policy stood in the name of a nominal trustee; but that was not deemed sufficient to change the jurisdiction; and the demurrer to the bill was allowed, and the decree was afterwards affirmed, in Parliament. 3 Bro. P. C. 525. The bill in this case states no special ground for equitable relief; nor is there any discovery sought which requires an answer.

Bill dismissed with costs.[1]

4 Cyc. 95 (58-59); W. P. 279 (70).

FIELD *v.* THE MAYOR &c. OF NEW YORK *et al.*

2 SELDEN (6 N. Y.), 179.—1852.

Bill in equity. Bill dismissed by trial court. Decree reversed in Supreme Court. Defendants appeal.

Defendant Bell had certain contracts with defendant corporation for printing to be done by him for the city. On March 14, 1842, he assigned to G. all bills that might become due to him for job printing, paper, or stationery done or furnished the defendant corporation, to the amount of $1500, after two other assignments should be paid, viz., one for $1500 to L., and one of $300 to C. Afterward on April 28, 1842, G. assigned the claim to plaintiff. Plaintiff gave the city notice of the claim on April 30, 1842.

Bell did work for the city after the assignment, and after the notice, but the city paid the amount due for it to Bell. Bell was insolvent.

The report of the referee showed that there became due to Bell after March 14, 1842, and after providing for the claims of L. and C. far more than enough to satisfy plaintiff's claim.

WELLS, J. By the assignment from Bell to Garread, of March 14, 1842, it was intended to transfer to and vest in the latter, the right and interest of the former in and to all the bills which might thereafter become due to him from the corporation of the city of New York, for job printing, paper, or stationery, done or furnished by Bell either be-

[1] "We have lately decided, after full consideration of the authorities, that an assignee of a chose in action on which a complete and adequate remedy exists at law cannot, merely because his interest is an equitable one, bring a suit in equity for the recovery of the demand. Hayward v. Andrews, 106 U. S. 672. He must bring an action at law in the name of the assignor to his own use."—Mr. Justice Bradley, in New York &c. Co. v. Memphis Water Co., 107 U. S. 205, 214. See also Walker v. Brooks, 125 Mass. 241.

fore or after the date of the assignment, to the amount of $1500; subject to the two prior assignments, to Lloyd & Hopkins, and to Coit. By the assignment from Garread to the respondent of April 28th, and the release from the former to the latter, of Decembber 27, 1842, the latter acquired all the right and interest of the former in the first assignment.

The case shows, that at the time of the commencement of the suit in the court of chancery, bills of the description mentioned had become due from the corporation to Bell, to an amount more than sufficient to satisfy all three of the assignments.

These bills appear to have accrued, and most of the services and materials upon which they arose appear to have been rendered and delivered, after the date of the assignment from Bell to Garread.

One of the questions presented by this appeal is whether the court of chancery had jurisdiction to decree payment by the corporation of the city of New York to the respondent of his claim. That it had such jurisdiction seems to be in accordance with reason and the theory of equity jurisprudence.

1. The assignment of Bell to Garread was valid and operative as an agreement, by which Garread and his assigns became entitled to receive payment of the bills in question, when the same should become due, to the amount indicated in the assignment subject to the two prior assignments. It did not operate as an assignment *in præsenti* of the choses in action, because they were not in existence, but remained in possibility merely. A possibility, however, which the parties to the agreement expected would, and which afterwards did in fact ripen into an actual reality; upon which, by force of the agreement, an equitable title to the benefit of the bills thus mature and due, became vested in the respondent as assignee of Garread. Story's Eq. Jur. §§ 1040, 1040 b, 1055; Mitchell v. Winslow, 2 Story's Rep. 630; Langton v. Horton, 1 Hare, 549.

It is contended by the counsel for the appellants, that the assignment of Bell to Garread did not pass any interest which was the subject of an assignment, for the reason that there was no contract at the time between Bell and the corporation of the city by which the latter was under any binding obligation to furnish the former with job printing or to purchase of him paper or stationery; and that therefore the interest was of too uncertain and fleeting a character to pass by assignment. There was indeed no present, actual, potential existence of the thing to which the assignment or grant related, and therefore it could not and did not operate *eo instanti* to pass the claim which was expected thereafter to accrue to Bell against the corporation; but it did nevertheless create an equity, which would seize upon those claims as they should arise, and would continue so to operate until the object of the agreement was accomplished. On this principle an assignment

of freight to be earned in future, will be upheld and enforced against the party from whom it becomes due. Story's Eq. Jur. § 1055, and authorities there cited; Langton v. Horton, and Mitchell v. Winslow, *supra;* Story on Bailments, § 294. Whatever doubts may have existed heretofore on this subject, the better opinion, I think, now is, that courts of equity will support assignments, not only of choses in action, but of contingent interests and expectations and of things which have no present, actual existence, but rest in possibility only, provided the agreements are fairly entered into, and it would not be against public policy to uphold them. Authorities may be found which seem to incline the other way, but which upon examination will be found to have been overruled, or to have turned upon the question of public policy.

2. A bill in equity was the proper remedy for the respondent in this case for the following reasons:

(1) The nature of the claim is one peculiarly of equitable cognizance. It was an equity only in relation to things not yet in possession, or in being, in the nature of a lien, which must be enforced through judicial process before it could be enjoyed, and must therefore of necessity be adjudicated in a court of equity. If the claims of Bell against the city had accrued and been in being at the time of the assignment, and the assignment had been of any specific entire claim, and perhaps if it had been of all claims then due from the city to Bell, the remedy of Garread, his assignee, might, and perhaps in general must, have been at law. But all the cases where the contract has been in relation to things not in existence at the time, and which were in expectancy and possibility merely, show that their adjudication belongs exclusively to a court of equity.

(2) But it seems to me that in this case, independently of the preceding considerations, there were insuperable difficulties in the way of sustaining an action at law. Such action must necessarily have been brought in the name of Bell, who had no interest until after all three of the assignments should be satisfied, of which the one to Garread was the last in the order of time, and was not to be satisfied until the others were provided for. I am aware that, as a general rule, the assignee of a chose in action may use the name of the assignor in an action at law to recover the amount. But it seems to me that the rule should be confined to cases where the whole of an entire demand is assigned to one person or party. Suppose A has an entire demand of $1000 against B, and assigns to C $100, to D $100, and to E $100, out of the $1000. Which of the three assignees shall institute an action against the debtor? Suppose we say C shall have the right, how much shall he recover? Shall it be the $1000? Clearly it must be that, or the residue will be gone, because the demand cannot be split and several actions sustained for the several parts assigned. But C has no right,

nor is he bound to litigate in relation to the parts assigned to D and E, or that part not assigned at all. Here would be four parties, having separate and distinct interests, one having as good right to commence an action, to discontinue it, and to direct in relation to it, as the other; and in case of disagreement, who is to decide? In the case at bar, the plaintiff had no right to sue in Bell's name for what was to be paid under the two first assignments, nor for what would be going to Bell after all three were paid; and he could not carve out just $1500 and the interest upon it, from the demands due from the city to Bell without splitting entire demands, which cannot be done. Smith v. Jones, 15 John. 229; Guernsey v. Carver, 8 Wend. 492; Stevens v. Lockwood, 13 Id. 644; Story's Eq. Jur. § 1250. . . .

The notice of the respondent's claims in this case, as appears from the evidence, was served upon the comptroller, while in his office, engaged in the duties thereof, and was beyond all doubt sufficient. Angell and Ames on Corporations, 247.

Upon all the points raised upon the argument, therefore, I am of the opinion that the judgment of the Supreme Court ought to be affirmed.

Judgment affirmed.

4 Cyc. 18 (31); 27-29 (51-54); 14 L. R. A. 126; 12 H. L. R. 139; 5 Mich. L. R. 115.

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c. By statute.

ALLEN *v.* BROWN.

44 NEW YORK, 228.—1870.

Action by plaintiff, as assignee, as for money had and received to the use of plaintiff's assignors. Judgment for plaintiff affirmed at General Term. Defendant appeals.

Defendant collected certain claims for the assignors, but refused to account for the proceeds. The assignors assigned all their interests to the plaintiff, but no consideration was paid by plaintiff.

HUNT, C. The appellant insists that the assignment from Cook, Clark, and Cary to the plaintiff, conveyed no title upon which this suit could be brought. This point is based upon the evidence given by Mr. Cook, when he testifies, "Allen paid me nothing, and I agreed with him that I would take care of the case, and if he got beat it should not trouble or cost him anything."

I am of the opinion that the assignment is sufficient to sustain this action.

The Code abolishes the distinction between actions at law and suits in equity, and between the forms of such actions. Section 69 [3339]. It is also provided, in section 111 [449], that every action must be prosecuted in the name of the real party in interest, except as other-

wise provided in section 113 [449]. The latter section provides that an executor, administrator, trustee of an express trust, may sue in his own name. These provisions pretended to abolish the common law rule, which prohibits an action at law otherwise than in the name of the original obligee or covenantee, although he had transferred all his interest in the bond or covenant to another. It accomplishes fully that object, although others than the assignee may have an ultimate beneficial interest in the recovery. In a case like the present, the whole title passes to the assignee, and he is legally the real party in interest, although others may have a claim upon him for a portion of the proceeds. The specific claim, and all of it, belongs to him. Even if he be liable to another as a debtor upon his contract for the collection he may thus make, it does not alter the case. The title to the specific claim is his. Durgin v. Ireland, 4 Kernan, 322; Williams v. Brown, 2 Keyes, 486, and cases cited; Paddon v. Williams, 1. Robt. R. 340; S. C. 2 Ab. R. N. S. 88. . . .

The judgment should be affirmed with costs.

[Leonard, C., also read for the affirmance.] All for affirmance, except Gray, C., not sitting.

Judgment affirmed with costs.

4 Cyc. 100 (74–75).

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d. Requisites of assignment.

SHAW, C. J., IN PALMER *v.* MERRILL.

6 CUSHING (MASS.), 282.—1850.

According to the modern decisions, courts of law recognize the assignment of a chose in action, so far as to vest an equitable interest in the assignee, and authorize him to bring an action in the name of the assignor and recover a judgment for his own benefit. But in order to constitute such an assignment, two things must concur: First, the party holding the chose in action must, by some significant act, express his intention that the assignee shall have the debt or right in question, and, according to the nature and circumstances of the case, deliver to the assignee, or to some person for his use, the security if there be one, bond, deed, note, or written agreement, upon which the debt or chose in action arises; and, secondly, the transfer shall be of the whole and entire debt or obligation, in which the chose in action consists, and, as far as practicable, place the assignee in the condition of the assignor, so as to enable the assignee to recover the full debt due, and to give a good and valid discharge to the party liable. The transfer of a chose in action bears an analogy in some respect to the transfer of personal property; there can be no actual manual tradition of a chose in action, as there must be of personal property to constitute a

lien; but there must be that which is similar, a delivery of the note, certificate, or other document, if there is any, which constitutes the chose in action, to the assignee, with full power to exercise every species of dominion over it, and a renunciation of any power over it on the part of the assignor. The intention is, as far as the nature of the case will admit, to substitute the assignee in place of the assignor as owner.

BURNETT *v.* GWYNNE.

2 ABBOTT'S PRACTICE REPORTS, 79.—1855.

(*New York Common Pleas.*)

Action by the plaintiff as assignee, upon an account for work and materials furnished for the defendant. On the cross-examination of the assignor, the defendant put to him the following question: "What consideration did you get of the plaintiff for the account?" This question was objected to by the plaintiff's counsel, but the justice overruled the objection, and the plaintiff excepted.

WOODRUFF, J. We think that where the object is to prove that the alleged assignment to the plaintiff is a mere sham, and that although an assignment in form has been executed, it was executed under an arrangement that recovery should be for the benefit of the alleged assignor, and that the form of an assignment was gone through with for the mere purpose of securing a recovery by means of the assignor's own testimony, while he was to receive and enjoy the fruits of the recovery, then proof that there was no consideration for the assignment, may, in connection with other evidence tending to those conclusions, be competent;[1] but the mere fact that there was no consideration does not alone amount to anything. A man may sell a claim for one dollar or for fifty dollars; he may give it away without consideration, and the assignment would be good. Standing alone, therefore, as the proposed evidence did, the question was immaterial, and we think furnishes no ground for reversal, when justice is done, whatever may be the answer to the question. We think the judgment should be affirmed. . . .[2]

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[1] But for recovery under the statute see Allen v. Brown, ante, p. 158.

[2] Upon the question as to consideration and assignment, see Consideration and the assignment of choses in action, by Edward Jenks, 16 Law Quar. Rev. 241; and the rejoinder, Assignment of choses in action, by Sir Wm. Anson, 17 Law Quar. Rev. 90.

TALLMAN *v.* HOEY, APPELLANT.

89 NEW YORK, 537.—1882.

Appeal from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made February 7th, 1881, which affirmed judgment in favor of plaintiff, entered upon a verdict, and affirmed an order denying a motion for a new trial.

This action was brought to recover a balance of the purchase-price of certain premises conveyed by plaintiff to defendant.

Defendant admitted that the balance claimed was unpaid, but set up as a counter-claim an indebtedness of plaintiff to one Lynch, a real estate broker, for commissions in effecting a sale of the premises, and an assignment of the claim to defendant. On the trial defendant gave in evidence the following instrument:

EXHIBIT I.

"J. B. TALLMAN:

"Please pay to Mr. John Hoey, or bearer, $850, being amount of commissions due me on sale of 624 Fifth Avenue.

"M. A. J. LYNCH.

"New York, January 18, 1872."

It did not appear that defendant was indebted to Lynch at the time of the delivery of said instrument to him, or that he paid or parted with anything on receipt thereof.

FINCH, J. The instrument which is the subject of this litigation is described by the plaintiff as a bill of exchange, and claimed by the defendant to operate as an equitable assignment of the commissions alleged to have been earned by Lynch and due from the plaintiff. If a bill of exchange, Tallman could not be made liable for want of acceptance in writing. If the holder can enforce it at all, it must be upon the ground of an equitable assignment. But the circumstance which justifies and induces that equitable construction which treats as an assignment what is not strictly and legally such, is the existence of a valuable consideration for the imperfect transfer. Brill v. Tuttle, 81 N. Y. 457. It proceeds upon a necessity demanded by the justice of the case, and to obviate an injury or a wrong which would otherwise occur. Where the holder has parted with nothing, and so loses nothing by the application of ordinary legal rules, no pressure of justice requires the intervention and the help of an equitable doctrine. And so it follows that, conceding the order to have been drawn on a particular fund (Att'y-Gen'l v. Continental Life Ins. Co., 71 N. Y. 325; 27 Am. Rep. 55), yet the presence of a valuable consideration upon which the order, or direction to pay, was founded, becomes the essential and necessary element of an equitable assignment. That element is wanting

in the present case. It is claimed, however, to be supplied by a legal presumption. It is undoubtedly true that where an actual assignment exists it is presumed, in the absence of proof of the facts, to have been made upon adequate consideration. Beldon v. Meeker, 47 N. Y. 311. But here no actual assignment was ever executed. The equitable rule which transforms a mere order into an assignment is brought into play by a just necessity, existing and established, and not by a mere possibility or presumption. But in the case at bar the facts proven repel any such presumption. Not only did both Lynch and Hoey, when upon the witness stand, fail to assert any consideration passing between them for the order on Tallman, but Lynch tells us substantially the contrary. He says that if the order was not paid he expected to get his commissions of Tallman, and afterward did settle with him for them as the real owner to whom they were due. These facts indicate that the order was without actual consideration; that it was held by Hoey merely for collection as the agent and on behalf of Lynch, or at most was an unexecuted and imperfect gift. In neither event could the doctrine of equitable assignment apply. We discover no ground upon which the counter-claim pleaded can rest, and the plaintiff's cause of action for the balance of purchase-money being conceded, a recovery for that was properly allowed.

The judgment should be affirmed with costs.

All concur.

Judgment affirmed.[1]

4 Cyc. 31 (65).

[1] "The difficulty in this case consists rather in ascertaining the true construction to be put upon the order than the legal principles applicable to the case. There can be no doubt as to the rule that when, for a valuable consideration from the payee, an order is drawn upon a third party and made payable out of a particular fund, then due or to become due from him to the drawer, the delivery of the order to the payee operates as an assignment *pro tanto* of the fund, and the drawee is bound, after notice of such assignment, to apply the fund, as it accrues, to the payment of the order and to no other purpose, and the payee may, by action, compel such application. It is equally well established that if a draft be drawn generally upon the drawee, to be paid by him in the first instance, on the credit of the drawer and without regard to the source from which the money used for its payment is obtained, the designation by the drawer of a particular fund, out of which the drawee is to subsequently reimburse himself for such payment, or a particular account to which it is to be charged, will not convert the draft into an assignment of the fund, and the payee of the draft can have no action thereon against the drawee unless he duly accepts. In all cases, therefore, in which a particular fund, to accrue *in futuro* is designated in the draft, and the language is ambiguous, the turning point is whether it was the intention of the parties that the payment should be made only out of the designated fund, when or as it should accrue, or whether the direction to the drawee to pay was intended to be absolute, and the fund was mentioned only as a source of re-

HAYNES, C., IN GRAHAM PAPER CO. *v.* PEMBROKE *et al.*

124 CALIFORNIA, 117.—1899.

To complete the assignment of an account as against the debtor, it is universally conceded that the debtor must have notice, as otherwise his debt will be discharged by payment to the assignor; but whether the prior assignee must give notice to the debtor in order to protect himself against a subsequent assignee is a question upon which there is a conflict in the authorities.

"It is a well-established rule in England that, as between successive assignees of a chose in action, he will have the preference who first gives notice to the debtor, even if he be a subsequent assignee, provided at the time of taking it he had no notice of the prior assignment." (2 Am. & Eng. Ency. of Law, 2d ed., p. 1077.) The reason of this rule is stated by Sir Thomas Plumer, M. R., in Dearle v. Hall, 3 Russ. 1, thus: "In Ryall v. Rowles, 1 Ves., Sen. 348, the judges held that in case of a chose in action you must do everything toward having possession which the subject admits; you must do that which is tantamount to obtaining possession, by placing every person who has an equitable or legal interest in the matter under an obligation to treat it as your property. For this purpose you must give notice to the legal holder of the fund; in the case of a debt, for instance, notice to the debtor is for many purposes tantamount to possession. If you omit to give that notice, you are guilty of the same degree and species of neglect as he who leaves a personal chattel, to which he has acquired title, in the actual possession

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imbursement or an instruction as to book-keeping."—Brill v. Tuttle 81 N. Y. 454.

In Heermans v. Ellsworth, 64 N. Y. 159, the action was by plaintiff, as trustee of Fellows, to recover a balance of account for moneys loaned by Fellows to defendant. Defense, payment to Fellows. The plaintiff gave evidence tending to show that before the payment to Fellows, defendant had notice of the trust. Defendant testified he had no notice. The court held: "There was no error in the charge of the judge upon the trial, that the burden of proof was upon the plaintiff, upon the question of notice, and that it was incumbent upon him to establish the fact of notice. . . . At common law an action to recover upon an instrument not negotiable, was necessarily brought in the name of the original owner or payee, and if payment was pleaded it was not enough that the replication denied the payment, without averring both the assignment and notice of the transfer before payment. 19 J. R. 95; 1 Hill, [552]. Unless this was done the pleading was insufficient and the proof could not be given. Proof of payment to the creditor established a complete defense, and when this is made out it belongs to the other side to answer or avoid it by evidence of the assignment of the demand and notice thereof to the debtor. As he alleges that the payment was not made to the proper person, he is bound to establish it." See 4 Cyc. 34 (77); W. P. 282 (75).

and under the absolute control of another person." The English rule has been followed by the federal courts in this country. [The court here cites, Judson v. Corcoran, 17 How. 612; Spain v. Brent, 1 Wall. 604, 624; Laclede Bank v. Schuler, 120 U. S. 511; and states Methven v. Staten Island, etc., Co., 66 Fed. Rep. 113.]

This proposition is also sustained in 2 Story's Equity Jurisprudence, section 1035 a, and in note 4 (p. 339), Foster v. Cockerell, 9 Bligh, 332, 375, 376, is quoted at considerable length, stating what appears to us satisfactory reasons in its support.

In 2 Pomeroy's Equity Jurisprudence, section 695, the same doctrine is stated, and at § 698 the learned author added: "Even where the rule concerning notice to the debtor or trustee has not been adopted, an assignee who had otherwise the priority may lose it through his laches, as against a subsequent purchaser in good faith and for value who has been injured by the negligence. . . . The questions as to priority of right may arise between the assignee and a judgment creditor of the assignor or a subsequent purchaser from the assignor. There is a clear distinction between these two claimants, since a judgment creditor only succeeds to the rights of his debtor, while a purchaser *may* acquire higher rights." (See, also, 2 Pomeroy's Equity Jurisprudence, § 707.) In 2 American and English Encyclopedia of Law, page 1077, notes 3 and 4, Iowa, Missouri, Vermont, and Virginia are mentioned as supporting the English rule, and New Jersey, New York, and Texas as rejecting it. To the former list may be added Connecticut. See Bishop v. Holcomb, 10 Conn. 444; Foster v. Mix, 20 Conn. 395.

Appellant cites a large number of the New York cases in support of its contention, and it must be conceded that they sustain the general proposition that the prior assignee has the better right, though he has not notified the debtor. We think, however, that the doctrine announced by the English courts, and followed by our federal courts and the state courts above mentioned, is based upon the better reason and sustained by the weight of authority. Notice to the debtor not only protects the assignee against payment to the assignor, but against payment to the subsequent assignee, since the debtor, with notice of the prior assignment, would be no more protected by a payment to a subsequent assignee than he would by paying to the assignor; and, besides, an intending purchaser of the accounts from the assignor would have it in his power to ascertain from the debtors, by inquiry, whether any prior assignment existed, and would thus be furnished with the only reasonable protection possible against fraud on the part of the assignor.

4 Cyc. 78 (82-84); W. P. 281 (73).

MUIR *v.* SCHENCK & ROBINSON.

3 HILL (N. Y.), 228.—1842.

The bond in question, and a mortgage of the same date, were executed by the defendants to the plaintiff. The first three installments were paid to the plaintiff, who, on the 13th of November, 1839, assigned and delivered the bond to Ira Doty, as collateral security for the payment of a note of $318.85. On the 9th of March, 1840, the plaintiff executed to Sedgewick Austin an absolute assignment of the mortgage "and the bond therein referred to," in payment of certain notes held by Austin against the plaintiff, which were thereupon delivered up to the latter. Austin gave immediate notice of the assignment to the defendants, who promised to pay him. Accordingly, in September, 1840, the defendants paid Austin the fourth installment ($342), and on the 6th of September, 1841, they paid the balance; whereupon he acknowledged satisfaction of the mortgage. Intermediate these two payments, viz. in October, 1840, Doty gave notice to the defendants that the bond had been assigned to him before the assignment to Austin; and forbade any further payments to the latter. This action was brought for the benefit of Doty, who insisted that he was entitled to recover the last installment with interest.

COWEN, J. The question is, whether the defendants were right in preferring Austin, and making the first payment to him instead of Doty. Doty had the first assignment from the obligee, and, as between him and Austin was entitled to the money. In a conflict of equitable claims, the rule is the same at law as in equity, *qui prior est tempore, potior est jure.* There was no need of notice to Austin for the purpose of securing a preference as against him; and Austin might have been compelled at the election of Doty to pay over to him the last installment received from the defendants. But before that installment was paid, he chose to fix the defendants by giving notice of his right to them, and forbidding the paying of any more to Austin. The payments were correctly made to the latter, till notice. The payment afterwards, was in the defendants' own wrong. The notice, when it came, afforded them a complete protection, and had the further effect to render what was before an inchoate right in Doty, perfect from the beginning. As Austin had never any right to receive, the defendants had now no right to pay. No one would doubt that the first assignment divested the right of the obligee, though the legal interest remained in him. Could he transfer to Austin a greater right than his own? His legal interest was not

assignable; and he had parted with all his equitable right. Does it not follow that nothing remained for Austin?[1] . . .

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e. By the law merchant: negotiability.

SHAW *v.* RAILROAD CO.

101 UNITED STATES, 557.—1879.

Replevin by Merchants' National Bank of St. Louis against Shaw & Esrey, of Philadelphia, to recover possession of certain cotton marked "W. D. I." One hundred and forty-one bales thereof having been taken possession of by the marshal, were returned to the defendants upon their entering into the proper bond. Judgment for plaintiff for "the value of goods eloigned." Defendants bring error.

Norvel & Co., of St. Louis, drew a draft on M. Kuhn & Brother, of Philadelphia, attached thereto as collateral security an original bill of lading for one hundred and seventy bales of cotton shipped to Philadelphia, and sold the draft, with the bill of lading attached, to plaintiff. The duplicate bill of lading they sent to Kuhn & Brother. Plaintiff forwarded the draft, with bill of lading attached, to the Bank of North America, of Philadelphia, for presentation and acceptance. The Bank of North America presented the draft to Kuhn & Brother, who accepted the draft, but secretly detached the original bill of lading and substituted the duplicate. Kuhn & Brother then indorsed the original bill of lading to Miller & Brother, who, through a broker, and with the consent of Kuhn & Brother, sold the cotton in controversy by sample to defendants. The original bill of lading was deposited with the Railroad Company, and the cotton, on its arrival, was delivered to defendants. Kuhn & Brother subsequently failed, their accepted draft was protested, and the fact that the plaintiff held the duplicate bill of lading was then discovered.

Defendants contend that the bill of lading was negotiable in the ordinary sense of that word; that Miller & Brother purchased it for value in the usual course of business and thereby acquired a valid title to the cotton, which was not impaired by proof of Kuhn and Brother's fraud. The jury found, (1) that plaintiff's agent was not negligent in parting with possession of the bill of lading, and (2) that Miller & Brother knew facts from which they had reason to believe that the bill of lading was held to secure payment of an outstanding draft.

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[1] "It is well settled in this State that an assignment of a thing in action passes the whole title to the assignee, as between him and a subsequent assignee. Notice is only necessary as to the debtor."—Greentree v. Rosenstock, 61 N. Y. 583.

MR. JUSTICE STRONG. The defendants below, now plaintiffs in error, bought the cotton from Miller & Brother by sample, through a cotton broker. No bill of lading or other written evidence of title in their vendors was exhibited to them. Hence, they can have no other or better title than their vendors had.

The inquiry, therefore, is, what title had Miller & Brother as against the bank, which confessedly was the owner, and which is still the owner unless it has lost its ownership by the fraudulent act of Kuhn & Brother. The cotton was represented by the bill of lading given to Norvel & Co., at St. Louis, and by them indorsed to the bank, to secure the payment of an accompanying discounted time-draft. That indorsement vested in the bank the title to the cotton, as well as to the contract. While it there continued, and during the transit of the cotton from St. Louis to Philadelphia, the indorsed bill of lading was stolen by one of the firm of Kuhn & Brother, and by them indorsed over to Miller & Brother, for an advance of $8500. The jury has found, however, that there was no negligence of the bank, or of its agents, in parting with possession of the bill of lading, and that Miller & Brother knew facts from which they had reason to believe it was held to secure the payment of an outstanding draft; in other words, that Kuhn & Brother were not the lawful owners of it, and had no right to dispose of it.

It is therefore to be determined whether Miller & Brother, by taking the bill of lading from Kuhn & Brother under these circumstances, acquired thereby a good title to the cotton as against the bank.

In considering this question, it does not appear to us necessary to inquire whether the effect of the bill of lading in the hands of Miller & Brother is to be determined by the law of Missouri, where the bill was given, or by the law of Pennsylvania, where the cotton was delivered. The statutes of both States enact that bills of lading shall be negotiable by indorsement and delivery. The statute of Pennsylvania declares simply, they "shall be negotiable and may be transferred by indorsement and delivery"; while that of Missouri enacts that "they shall be negotiable by written indorsement thereon and delivery, *in the same manner* as bills of exchange and promissory notes." There is no material difference between these provisions. Both statutes prescribe the manner of negotiation; *i. e.* by indorsement and delivery. Neither undertakes to define the effect of such a transfer.

We must, therefore, look outside of the statutes to learn what they mean by declaring such instruments negotiable. What is negotiability? It is a technical term derived from the usage of merchants and bankers, in transferring, primarily, bills of exchange, and, afterwards, promissory notes. At common law no contract was assignable,

so as to give to an assignee a right to enforce it by suit in his own name. To this rule bills of exchange and promissory notes, payable to order or bearer, have been admitted exceptions, made such by the adoption of the law merchant. They may be transferred by indorsement and delivery, and such a transfer is called negotiation. It is a mercantile business transaction, and the capability of being thus transferred, so as to give to the indorsee a right to sue on the contract in his own name, is what constitutes negotiability. The term "negotiable" expresses, at least primarily, this mode and effect of a transfer.

In regard to bills and notes, certain other consequences generally, though not always, follow. Such as a liability of the indorser, if demand be duly made of the acceptor or maker, and seasonable notice of his default be given. So if the indorsement be made for value to a *bona fide* holder, before the maturity of the bill or note, in due course of business, the maker or acceptor cannot set up against the indorsee any defense which might have been set up against the payee, had the bill or note remained in his hands.

So, also, if a note or bill of exchange be indorsed in blank, if payable to order, or if it be payable to bearer, and therefore negotiable by delivery alone, and then be lost or stolen, a *bona fide* purchaser for value paid acquires title to it, even as against the true owner. This is an exception from the ordinary rule respecting personal property. But none of these consequences are necessary attendants or constituents of negotiability, or negotiation. That may exist without them. A bill or note past due is negotiable, if it be payable to order, or bearer, but its indorsement or delivery does not cut off the defenses of the maker or acceptor against it, nor create such a contract as results from an indorsement before maturity, and it does not give to the purchaser of a lost or stolen bill the rights of the real owner.

It does not necessarily follow, therefore, that because a statute has made bills of lading negotiable by indorsement and delivery, all these consequences of an indorsement and delivery of bills and notes before maturity ensue or are intended to result from such negotiation.

Bills of exchange and promissory notes are exceptional in their character. They are representatives of money, circulating in the commercial world as evidence of money, "of which any person in lawful possession may avail himself to pay debts or make purchases or make remittances of money from one country to another, or to remote places in the same country. Hence, as said by Story, J., it has become a general rule of the commercial world to hold bills of exchange, as in some sort, sacred instruments in favor of *bona fide* holders for a valuable consideration without notice." Without such a holding they could not perform their peculiar functions. It is for this reason it is held that if a bill or note, indorsed in blank or payable to bearer,

be lost or stolen, and be purchased from the finder or thief, without any knowledge of want of ownership in the vendor, the *bona fide* purchaser may hold it against the true owner. He may hold it though he took it negligently, and when there were suspicious circumstances attending the transfer. Nothing short of actual or constructive notice that the instrument is not the property of the person who offers to sell it; that is, nothing short of *mala fides* will defeat his right. The rule is the same as that which protects the *bona fide* indorser of a bill or note purchased for value from the true owner. The purchaser is not bound to look beyond the instrument. Goodman v. Harvey, 4 Ad. & E. 870; Goodman v. Simonds, 20 How. 343; Murray v. Lardner, 2 Wall. 110; Matthews v. Poythress, 4 Ga. 287. The rule was first applied to the case of a lost bank-note (Miller v. Race, 1 Burr. 452) and put upon the ground that the interests of trade, the usual course of business, and the fact that bank-notes pass from hand to hand as coin, require it. It was subsequently held applicable to merchants' drafts, and in Peacock v. Rhodes (2 Doug. 633) to bills and notes, as coming within the same reason.

The reason can have no application to the case of a lost or stolen bill of lading. The function of that instrument is entirely different from that of a bill or note. It is not a representative of money, used for transmission of money, or for the payment of debts or for purchases. It does not pass from hand to hand as bank-notes or coin. It is a contract for the performance of a certain duty. True, it is a symbol of ownership of the goods covered by it,—a representative of those goods. But if the goods themselves be lost or stolen, no sale of them by the finder or thief, though to a *bona fide* purchaser for value, will divest the ownership of the person who lost them, or from whom they were stolen. Why then should the sale of the symbol or mere representative of the goods have such an effect? It may be that the true owner by his negligence or carelessness may have put it in the power of a finder or thief to occupy ostensibly the position of a true owner, and his carelessness may estop him from asserting his right against a purchaser who has been misled to his hurt by that carelessness. But the present is no such case. It is established by the verdict of the jury that the bank did not lose its possession of the bill of lading negligently. There is no estoppel, therefore, against the bank's right.

Bills of lading are regarded as so much cotton, grain, iron, or other articles of merchandise. The merchandise is very often sold or pledged by the transfer of the bills which cover it. They are, in commerce, a very different thing from bills of exchange and promissory notes, answering a different purpose and performing different functions. It cannot be, therefore, that the statute which made them negotiable by indorsement and delivery, or negotiable *in the same*

manner as bills of exchange and promissory notes are negotiable, intended to change totally their character, put them *in all respects* on the footing of instruments which are the representatives of money, and charge the negotiation of them with all the consequences which usually attend or follow the negotiation of bills and notes. Some of these consequences would be very strange if not impossible. Such as liability of indorsers, the duty of demand *ad diem,* notice of non-delivery by the carrier, etc., or the loss of the owner's property by the fraudulent assignment of a thief. If these were intended, surely the statute would have said something more than merely make them negotiable by indorsement. No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express. Especially is so great an innovation as would be placing bills of lading on the same footing in all respects with bills of exchange not to be inferred from words that can be fully satisfied without it. The law has most carefully protected the ownership of personal property, other than money, against misappropriation by others than the owner, even when it is out of his possession. This protection would be largely withdrawn if the misappropriation of its symbol or representative could avail to defeat the ownership, even when the person who claims under a misappropriation had reason to believe that the person from whom he took the property had no right to it.

We think, therefore, that the rule asserted in Goodman v. Harvey, Goodman v. Simonds, Murray v. Lardner (*supra*), and in Phelan v. Moss (67 Pa. St. 59), is not applicable to a stolen bill of lading. At least the purchaser of such a bill, with reason to believe that his vendor was not the owner of the bill, or that it was held to secure the payment of an outstanding draft, is not a *bona fide* purchaser, and he is not entitled to hold the merchandise covered by the bill against its true owner. In the present case there was more than mere negligence on the part of Miller & Brother, more than mere reason for suspicion. There was reason to believe Kuhn & Brother had no right to negotiate the bill. This falls very little, if any, short of knowledge. It may fairly be assumed that one who has reason to believe a fact exists, knows it exists. Certainly, if he be a reasonable being.

This disposes of the principal objections urged against the charge given to the jury. They are not sustained. The other assignments of error are of little importance. We cannot say there was no evidence in the case to justify a submission to the jury of the question whether Miller & Brother knew any fact or facts from which they had reason to believe that the bill of lading was held to secure payment of an outstanding draft. It does not appear that we have

before us all the evidence that was given, but if we have, there is enough to warrant a submission of that question.

The exceptions to the admission of testimony, and to the cross-examination of Andrew H. Miller, are not of sufficient importance, even if they could be sustained, to justify our reversing the judgment. Nor are we convinced that they exhibit any error.

There was undoubtedly a mistake in entering the verdict. It was a mistake of the clerk in using a superfluous word. The jury found a general verdict for the plaintiff. But they found the value of the goods "eloigned" to have been $7015.97. The word "eloigned" was inadvertently used, and it might have been stricken out. It should have been, and it may be here. The judgment was entered properly. As the verdict was amendable in the court below, we will regard the amendment as made. It would be quite inadmissible to send the case back for another trial because of such a verbal mistake.

Judgment affirmed.[1]

6 Cyc. 424 (24, 27–28); W. P. 302 (6).

PARKER, J., IN GOSHEN NATIONAL BANK *v.* BINGHAM.

118 NEW YORK, 349.—1890.

It is too well settled by authority, both in England and in this country, to permit of questioning, that the purchaser of a draft, or check, who obtains title without an endorsement by the payee, holds it subject to all equities and defences existing between the original parties, even though he has paid full consideration, without notice of the existence of such equities and defences. Harrop v. Fisher, 30 L. J. (C. L., N. S.), 283; Whistler v. Forster, 14 C. B. (N. S.) 246; Savage v. King, 17 Me. 301; Clark v. Callison, 7 Ill. 263; Haskell v. Mitchell, 53 Me. 468; Clark v. Whitaker, 50 N. H. 474; Calder v. Billington, 15 Me. 398; Lancaster Nat. Bank v. Taylor, 100 Mass. 18; Gilbert v. Sharp, 2 Lans. 412; Hedges v. Sealy, 9 Barb. 214–218; Franklin Bank v. Raymond, 3 Wend. 69; Raynor v. Hoagland, 7 J. & S. 11; Muller v. Pondir, 55 N. Y. 325; Freund v. Importers' & Traders' Bank, 76 N. Y. 352; Trust Co. v. Nat. Bank, 101 U. S. 68; Osgood v. Artt, 17 Fed. Rep. 575.

The reasoning on which this doctrine is founded may be briefly stated as follows: The general rule is that no one can transfer a better title than he possesses.[2] An exception arises out of the rule

[1] "The term 'negotiable,' in its enlarged signification, applies to any written security which may be transferred by indorsement or delivery, so as to vest in the indorsee the legal title, so as to enable him to maintain a suit thereon in his own name."—Scott, J., in Odell v. Gray, 15 Mo. 337, 342.

[2] See, for example, Alexander v. Brogley, *ante* p. 276.

of the law merchant, as to negotiable instruments. It is founded on the commercial policy of sustaining the credit of commercial paper. Being treated as currency in commercial transactions, such instruments are subject to the same rule as money. If transferred by endorsement, for value, in good faith and before maturity, they become available in the hands of the holder, notwithstanding the existence of equities and defences, which would have rendered them unavailable in the hands of a prior holder.

This rule is only applicable to negotiable instruments which are negotiated according to the law merchant.

When, as in this case, such an instrument is transferred but without an endorsement, it is treated as a chose in action assigned to the purchaser. The assignee acquires all the title of the assignor, and may maintain an action thereon in his own name. And, like other choses in action, it is subject to all the equities and defences existing in favor of the maker or acceptor against the previous holder.

All concur, except Haight, J., not sitting.

Judgments accordingly.

7 Cyc. 791–792 (17–30).

Assignment of contractual rights and liabilities by operation of law.

(*i.*) *Assignment of obligations upon the transfer of interests in lands.*

a. Covenants affecting leasehold interests.

Assignment by lessee.

GORDON *v.* GEORGE.

12 INDIANA, 408.—1859.

Appeal from the Madison Court of Common Pleas.

HANNA, J. Sarah George, the appellee, gave a written lease to one Black, stipulating therein that Black should have the use of a parcel of land for five years; in consideration of which Black was to clear the land and make it ready for the plow, and leave the premises in good repair. It was further agreed that Black should build a cabin and smoke-house, and dig a well on the premises, for which Sarah George was to pay twenty-five dollars and thirty-seven cents. Before clearing the land or building the cabin, etc., Black assigned the lease, by indorsement, to the said James Gordon, appellant.

Gordon sued before a justice, alleging that he had built the house and smoke-house and dug the well; that the time had expired, and the lessor refused to pay for said house, etc.

The plaintiff recovered a judgment before the justice for forty-two

dollars. On appeal to the Common Pleas, the defendant had a verdict and judgment for twelve dollars.

The defendant, among other things, set up, by way of counter-claim, that the plaintiff had not cleared the ground according to the contract, etc.

The plaintiff asked the court to instruct the jury, that, "if the jury find the matters of counter-claim of the defendant exceed the amount which the jury may find due the plaintiff, the jury cannot find against the plaintiff such excess," which was refused. Upon this ruling of the court, the only point made, by brief of counsel, is predicated.

By the statute (2 R. S. p. 120) plaintiff may dismiss his action; but by § 365, "In any case, where a set-off or counter-claim has been presented, which, in another action, would entitle the defendant to a judgment against the plaintiff, the defendant shall have the right of proceeding to the trial of his claim, without notice, although the plaintiff may have dismissed his action, or failed to appear."

So in Vassear v. Livingston (3 Kern. 252) it is said that, "a counter-claim must contain the substance necessary to sustain an action on behalf of the defendant against the plaintiff, if the plaintiff had not sued the defendant."

In Howland v. Coffin (9 Pick. 52) it was held by the Supreme Court of Massachusetts, "that the assignee of the lessee is liable to the assignee of the lessor in an action of debt for the time he holds; for though there is no privity of contract, there is a privity of estate which creates a debt for the rent." See authorities cited.

In another case between the same parties, it is said (12 Pick. 125), "the defendant took the term subject to all the advantages and disadvantages attached to it by the terms of the lease. The covenant for the payment of the rent ran with the land, and by the assignment of the term became binding on the defendant." See Farmers' Bank v. The Mutual Ins. Soc., 4 Leigh (Va.), 69; Taylor's Landlord and Tenant, 76; Provost v. Calder, 2 Wend. 517; 23 Id. 506; 21 Id. 32; Vernon v. Smith, 5 Barn. and Adol. 1.

It resolves itself into the question, then, under the above, and § 59, p. 41, of the same statute, and the authorities cited, whether the plaintiff was liable to the defendant for the non-performance of the contract of his assignor. We think, under the circumstances of this case, he was. He became the assignee of the whole interest of Black, before any part of the contract was performed. By receiving an assignment of the lease, and taking possession of the land under it, he surely became liable to perform the stipulations of that lease, so far as they had reference to improvements upon said land, if no others, of which we do not decide, as it is not necessary to do so.

The ruling of the court upon the instruction was correct.

Per Curiam. The judgment is affirmed, with 10 per cent damages and costs.

24 Cyc. 918 (91-99, 1-3); 962 (72-73); 980 (20); 14 L. R. A. 151; W. P. 299 (95).

Assignment by lessor.

FISHER *v.* DEERING.

60 ILLINOIS, 114.—1871.

Mr. Justice Walker. It appears, from an examination of the authorities, that at the ancient common law a lease was not assignable so as to invest the assignee with the legal title to the rent. Such instruments were, in that respect, on a footing with other agreements and choses in action. But the 32 Hen. VIII., ch. 34, § 1, declared that the assignee of the reversion should become invested with the rents. But notwithstanding this enactment, the courts held that the assignee of the reversion could not sue for and recover the rent unless the tenant should attorn, when the holder of the reversion might recover subsequently accruing rent in an action of debt. Marle v. Flake, 3 Salk. 118; Robins v. Cox, 1 Levinz, 22; Ards v. Watkin, 2 Croke's Eliz. 637; Knolles' Case, 1 Dyer, 5 b; Allen v. Bryan, 5 Barn. & Cress. 512, and the note.

In Williams v. Hayward (1 Ellis & Ellis, 1040), after reviewing the old decisions on this question, it was, in substance, held that, under the 32 Hen. VIII., an assignee of the rent, without the reversion, could recover when there was an attornment, and that such an assignee could, under the 4 of Anne, recover without an attornment.

The courts seem to have proceeded upon the ground that there could be no privity of contract unless the tenant should attorn to the assignee of the reversion; that, whilst the assignment of the reversion created a privity of estate between the assignee and the tenant, privity of contract could only arise by an agreement between them. Some confusion seems to have got into the books from calling the purchaser of the reversion an assignee of the lease, by its passing by the conveyance as appurtenant to the estate. But where the tenant attorned to the assignee of the reversion the assignment became complete, and then there existed both privity of estate and of contract between the assignee and the tenant, and by reason of the privity of contract the assignee might sue in debt, and recover subsequently accruing, but not rent in arrear at the time he acquired the reversion.

To give the assignee of the reversion a more complete remedy, the 4 and 5 Anne, ch. 16, § 9, was adopted, dispensing with the necessity

of an attornment which the courts had held to be necessary under the 32 Hen. VIII., to create a privity of contract. But this latter act has never been in force in this State, and hence the decisions of the British courts, made under it, are not applicable In many States of the Union this latter act has been adopted, and the decisions of their courts conform, of course, to its provisions. But we having adopted the common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British Parliament made in aid of, and to supply defects of, the common law, prior to the fourth year of James the First, except certain enumerated statutes, and which are of a general nature and not local to that kingdom, they are declared to be the rule of decision, and shall be considered of full force until repealed by legislative authority. Gross' Comp. 1869, 416. It then follows that the 32 Hen. VIII., ch. 34, § 1, is in force in this State, as it is applicable to our condition, and is unrepealed. And we must hold, that the construction given to that act by the British courts was intended also to be adopted.

The facts in this case show such a privity of contract as brings it fully within the rule announced in the above cases. Appellee paid to appellant several instalments of rent falling due under the lease after it was assigned to him. By paying the rent, the lessee fully recognized the appellant as his landlord, and created the necessary privity of contract to maintain the action.

The case of Chapman v. McGrew (20 Ill. 101) announces a contrary doctrine. In that case this question was presented, and notwithstanding the lessee had fully recognized the assignee of the lease as his landlord, it was held that the lessor of the premises might maintain an action to recover the rent. In that case, the fact that the lessee had attorned to the assignee was given no weight, and the fact that such privity was thereby created as authorized the assignee of the lease to sue for, and recover the rent, was overlooked. In that, the decision was wrong. The right of action could not be in both the lessor and his assignee, and the privity thus created gave it to the latter.

The subsequent case of Dixon v. Buell (21 Ill. 203) only holds that such an assignee, whether he holds the legal or equitable title to the lease, may have a claim for rent growing out of the lease, probated and allowed against the estate of the lessee. That case has no bearing on the case at bar.

The judgment of the court below is reversed and the cause remanded. Judgment reversed.[1]

24 Cyc. 928–930 (72–95).

[1] The remedy has since been extended to the grantee without attornment. Ill. R. S. ch. 80, § 14. Cf. Crawford v. Chapman, 17 Ohio St. 449.

b. Covenants affecting freehold interests.

SHABER *v.* ST. PAUL WATER CO.

30 MINNESOTA, 179.—1883.

Action for breach of covenant. Demurrer to complaint overruled. Defendant appeals.

BERRY, J. In January, 1869, John R. Irvine and Nancy Irvine owned certain land (in the city of St. Paul) through which ran Phalen Creek, affording a valuable mill privilege thereon. Leonard Schiegel, as the lessee of the Irvines, had constructed a dam and race upon the land, by which the mill privilege was utilized in the running of a flour mill, which he had also erected thereon and was operating. By sundry subsequent conveyances the land, with the race, dam, mill, and privilege, came to Henry Shaber, the plaintiff's intestate, and the same are now part of his estate. The defendant corporation, the St. Paul Water Company, was formed to supply the city of St. Paul with water. In January, 1869, the company, in carrying out this purpose of its creation, was about to tap Lake Phalen and lay pipes by which to divert and draw off the water thereof. Phalen Creek flows from Lake Phalen, which is the last and lowest of a chain or series of lakes, constituting a local water system. The Irvines and Schiegel objected to the proposed diversion of water, refused to permit it, and threatened to enjoin it, because, unless provision was made for bringing into Lake Phalen, from other sources and by artificial means, as much water over and above what naturally flowed into the same as the company should at any time draw out, the level of the lake would be lowered, the quantity of the water flowing into the creek diminished, and the mill privilege impaired and destroyed.

To remove the opposition, and to induce them to refrain from enjoining its proceedings, the company entered into a written agreement, by which, "for a good and valuable consideration," it covenanted and agreed with the Irvines and Schiegel, "their heirs and assigns, severally and separately," that it would make certain specified "improvements," such as dams, gates, canals, and channels, all within one year from the 8th day of February, 1869; that it would at all times thereafter keep and maintain the same in a "good, strong, and substantial manner," and that it would do and refrain from doing certain other things, all having reference to maintaining the supply of water in the creek; and further, that the volume of water flowing out of Lake Phalen through Phalen Creek should never at any time be diminished or rendered less available for the purpose of the water-power mill privilege before mentioned, by any work or operation of

the company, than it had been before it commenced its operations; that it would never draw or take out of the lake at any time any more water than such quantity as it should introduce into the same by its said improvements and by artificial means over and above the quantity which naturally flowed into the same; and that it would, by its said improvements and by artificial means, introduce and lead into the lake at all times as large a volume of water as it should draw out, in addition to what flowed into the lake through natural channels. The plaintiff alleges that defendant has failed to make the specified "improvements," and that it has broken its covenants in reference to maintaining the stage and quantity of water in the creek, and that, in consequence of said failure and breaches, the flow of water in the creek has been diminished by the drawing and diverting of water by defendant from Lake Phalen, and thereby the said Shaber, in his lifetime, and his estate since his decease, has been greatly damaged (as particularly set forth) in respect to the mill, water privilege, and the use and operation of the same, and that he and his estate have been subjected to great expense and loss on account thereof. This appeal is taken from an order overruling defendant's general demurrer to the complaint.

Our examination of the case has brought us to the conclusion that the appeal presents a single question, viz.: Whether any of the covenants entered into by defendant run with the land of the covenantees to Shaber and his estate? This is a pure common law question, to be decided upon the authorities.

We think the following propositions embody the rules of law applicable to the case, and that they are supported by the authorities cited: A covenant runs with land when either the liability to perform it, *i. e.* its burden, or the right to take advantage of it, *i. e.* its benefit, passes to the assignee of the land. Savage v. Mason, 3 Cush. 500; 1 Smith's Lead. Cas. 120.

To enable a convenant to run with land so as to give the assignee its *benefit,* the covenantee must be the owner of the land to which the covenant relates; but the covenantor may be either a person in privity of estate with the covenantee, or a stranger; while, with reference to the subject of the covenant, it is sufficient that it be for something to be done, or refrained from, about, touching, concerning, or affecting the covenantee's land (though not upon it), if the thing covenanted for be for the benefit of the same, or tend to increase its value in the hands of the holder. Spencer's Case and notes, Eng. & Amer.; 1 Smith Lead. Cas. (7th Am. ed.) 115, where all the learning upon the subject appears to be collected; Pakenham's Case, 42 Edw. III. 3, abstracted in 1 B. & C. 410, 415; Anson on Contracts, 220; Pollock on Contracts, 219; Rawle on Covenants, 334, and notes; Norman v. Wells, 17 Wend. 136; Norfleet v. Cromwell,

70 N. C. 634; 1 Smith Lead. Cas. 122, 124, 139, 140, 175, 177, 181, 183; Allen v. Culver, 3 Denio, 284; Van Rensselaer v. Smith, 27 Barb. 104, 146; National Bank v. Segur, 39 N. J. Law, 173.

The case at bar is controlled by these principles. The Irvines—the covenantees—were the owners of the land to which the defendant's covenants related; that is to say, they owned the mill site upon which was the water privilege which it was the object and purpose of the covenants to preserve and protect; and the covenants were for something to be done, and to be refrained from, about, touching, concerning, and affecting the covenantee's land, for the benefit thereof, and tending to increase its value in the hands of the holder. The covenants were of a character to run with the land, so as to enable the assignee of the covenantees to take advantage of them. When it is considered what it was that the water company proposed to do, and for what purpose the covenants were made, it would be astonishing if this were not the case. The diverting the water of Lake Phalen, without provision for counteracting it, would be a perpetual injury to the land of the covenantees. No protection against such an injury would be adequate unless it was also perpetual. That nothing less could have been fairly intended by the parties to the covenants is apparent from the allegations of the complaint.

It is insisted by defendant that the breach of the covenants was complete before plaintiff had acquired any interest in the property to which they related; that it had become a right of action, and did not pass to the plaintiff. If the covenants to make the specified improvements within a year from February 8, 1869, were all the covenants entered into, this point might possibly be well taken. But such is not the case. These improvements are not only to be made, but at all times thereafter to be kept and maintained in a "good, strong, and substantial manner," and the volume of water flowing out of Lake Phalen through the creek is to be maintained undiminished by any of the operations of the defendant, with other covenants of similar import. These are, therefore, continuing covenants, and for that reason, and because they run with the land, the damages from their breach accrue to him who holds the property when the breach occurs—or, in other words, to the person injured—and to him the right of action therefor necessarily belongs. Jeter v. Glenn, 9 Rich. (S. C.) Law, 374. In this respect they are analogous to covenants for quiet enjoyment and warranty, which inure to the protection of the owner for the time being of the estate which they are intended to assure. Rawle on Covenants, 352, and citations. The covenants relating to the making of the specified "improvements" provide for the means by which a certain result is to be accomplished, while these continuing covenants provide for the result itself. The latter are, therefore, the most important, because they go to the substance

rather than the form in which the result in view is to be accomplished. If the continuing covenants are kept, the damages for the breach of the others would be comparatively, if not altogether, nominal. For these reasons we are of opinion that the complaint states a cause of action, and that the demurrer was, therefore, properly overruled. We have not overlooked the case of Kimball v. Bryant (25 Minn. 496), though we have not before adverted to it, as it was not cited or alluded to upon the argument. But it seems to us that the principle of the decision there made may have an important bearing upon the case at bar, and in support of the conclusions to which we have arrived.

Order affirmed.[1]

11 Cyc. 1080–1082 (82–84); W. P. 299 (95); 300 (1).

INHABITANTS OF MIDDLEFIELD *v.* CHURCH MILLS KNITTING CO.

160 MASSACHUSETTS, 267.—1894.

Contract, to recover expenses incurred in repairing a bridge which defendant was bound to repair. Demurrer by defendant sustained. Plaintiff appeals.

The declaration alleged that the owners of land on a stream wishing to raise the stream into a pond for water-power changed and raised the highway and built a new bridge and approaches under an arrangement with plaintiff whereby the owners covenanted for themselves and successors to keep the same in repair; that the owners had for many years kept the same in repair; that defendant was now the owner of said land, pond, and water-power, and had succeeded to said prior owners' rights and obligations, but had failed and refused to keep the bridge in repair; that plaintiff had of necessity repaired the same, but defendant had refused to repay plaintiff the cost thereof.

Holmes, J. This is an action to recover the amount of damages which the plaintiff has been compelled to pay in consequence of a breach of a duty alleged to rest primarily on the defendant. The

[1] In Mott v. Oppenheimer (135 N. Y. 312), it is held that a covenant by one landowner for himself, his heirs, or assigns, to pay for one-half a party wall erected by an adjoining owner whenever he or they should make use of it, coupled with a further provision that the agreement should be construed as covenants running with the land, imposes a *burden* on the land of the covenantor and a *benefit* on the land of the covenantee which run with the land of each into the hands of grantees. Where there is no express stipulation that the covenant to pay for a party wall shall run with the land, it will be construed as a personal covenant. Cole v. Hughes, 54 N. Y. 444; Scott v. McMillan, 76 N. Y. 144; Bloch v. Isham, 28 Ind. 37. But the covenant to pay for future repairs runs with the land. Hart v. Lyon, 90 N. Y. 663.

declaration is not in covenant, to speak in terms of the old forms of action, but in assumpsit, on the principle of Lowell v. Spaulding (4 Cush. 277), Woburn v. Henshaw (101 Mass. 193), and other cases of that class. The mode in which the defendant's duty originated, whether by prescription (Regina v. Bucknall, 2 Ld. Raym. 804; Bac. Abr. Highways [E.]; Angell & D. Highways, § 255), or by grant or covenant having the effect of a grant (Bronson v. Coffin, 108 Mass. 175; Norcross v. James, 140 Mass. 188, 190; Ladd v. Boston, 151 Mass. 585, 588), or otherwise (Perley v. Chandler, 6 Mass. 454, 457, 458; Lowell v. Proprietors of Locks and Canals, 104 Mass. 18), is one step more remote than when the declaration is on the covenant directly. However it might be in the latter case, we are of opinion that the duty is sufficiently alleged for the purposes of the case at bar. See Bernard v. Cafferty, 11 Gray 10, 11; form of declaration for obstructing way, Pub. Sts., c. 167, § 94.

It is true that, in order to overrule the demurrer, we have to assume the possibility that the defendant might be bound as assign and tenant of a quasi servient estate to perform an active duty created by its predecessor in title; but in view of the foregoing and other decisions, we are not prepared to deny that it might be bound in law or in equity so far as to make it liable to indemnify the plaintiff to the extent of simple damages. It is true that, in general, active duties cannot be attached to land, and that affirmative covenants only bind the covenantor, his heirs, executors, and administrators. But there are some exceptions, and most conspicuous among them is the obligation to repair fences and highways. We do not deem it advisable to discuss the law in detail until the facts shall appear more exactly than they do at present. If such a duty can be attached to land, then, although ordinarily the corresponding right could not exist in gross, yet in the case of a way which a town is bound to keep in repair for the benefit of the public, the town is the natural and convenient protector of the obligation, and, being immortal and locally fixed, may enforce a covenant originally made to it without being shown to be strictly the owner of the highway as a quasi dominant estate, just as, conversely, a local corporation was bound to the terretenant to perform active services in Pakenham's case, Y. B. 42, Edw. III., 3, pl. 14.

Demurrer overruled.

11 Cyc. 1080-1082 (82-84); 1090 (12).

(*ii.*) *Assignment of contractual obligation upon marriage.*

PLATNER *v.* PATCHIN.

19 WISCONSIN, 333.—1865.

Action against Patchin and wife on a promissory note executed by the latter *dum sola*. Demurrer by wife that complaint shows a former action pending against her. Answer by Patchin that the wife still retains and possesses all her separate property. Motion for judgment, on the ground that demurrer and answer were frivolous, denied. Plaintiff appeals.

DIXON, C. J. . . . The wife being a necessary party to the action to enforce the liability of the husband, and it appearing on the face of the complaint that there is a former action pending against her, her demurrer was well taken, and the motion for judgment for the frivolousness of the demurrer and answer properly denied.

We see nothing in the answer of the husband which merits serious consideration. It is obviously frivolous. The statute for the protection of the rights of married women, whilst it greatly enlarges the privileges of the wife, does not restrict the liability of the husband. He must pay the same as before, and if he does not, the creditors of the wife can sue and make him pay if he is able. In this particular the modern husband is twice happy. First, he is happy as the quiet spectator of his wife's enjoyment of her property; and again he is happy in paying her debts, or, if he refuses, in being sued and compelled to pay.

Order affirmed.[1]

21 Cyc. 1212 (70–74); 1215 (3).

HOWARTH *v.* WARMSER, *et al.*

58 ILLINOIS, 48.—1871.

Action against Warmser and wife on a promissory note given by the wife *dum sola*. Judgment against defendants. Warmser appeals.

LAWRENCE, C. J. We held in Connor v. Berry (46 Ill. 370) and McMurtry v. Webster (48 Ill. 123) that the husband was still, as at common law, liable for the debts of his wife, contracted before marriage, notwithstanding the act of 1861, because that act still left to

[1] Changed by Ch. 155, L. 1872; 1 S. & B. Ann. St. of Wis. sec. 2346. See generally, Stimson's Am. St. Law, § 6402. "As between the creditor of the wife *dum sola* and the husband, the common law liability of the husband has not been changed by the legislation above referred to."—Alexander v. Morgan, 31 Ohio St. 546 (1877).

the husband the wife's earnings. Since those decisions were made, the legislature, by the act of 1869, has taken from the husband all control over the earnings of his wife, and thus swept away the last vestige of the reasons upon which the common law rule rested. The rule itself must now cease. Legislative action has virtually abolished it, by taking away its foundations and rendering its enforcement unjust.

The judgment must be reversed and the cause remanded.

Judgment reversed.

21 Cyc. 1215 (3).

(iii.) Assignment of contractual obligation by death.

DICKINSON *v.* CALAHAN'S ADM'RS.

19 PENNSYLVANIA STATE, 227.—1852.

Assumpsit and covenant for lumber delivered by the administrators of Calahan to the executors of Dickinson to apply on a contract made between Calahan and Dickinson. Defense, breach of contract in not delivering the full amount called for by such contract. Verdict for plaintiffs for full amount of claim.

LOWRIE, J. It seems to us very doubtful whether the oral contract could be rightly proved by the evidence that was submitted to the jury. But admit that it could. The one party, a lumber manufacturer, agreed to sell to the other, a lumber merchant, all the lumber to be sawed at his mill during five years, and that the quantity should be equal on an average to 300,000 feet in a year, without stipulating for any given quantity in any one year, and the lumber was to be paid for as delivered. Before the five years had expired, both parties died; and now the representatives of the vendee seek to hold those of the vendor bound to perform the contract, and to set off damages for the breach of it against a claim for part of the lumber delivered.

It will be seen that, in thus stating the question, we set aside the alleged breach in the lifetime of Calahan; and we do this because the court properly instructed the jury that, under such a contract, Calahan was guilty of no breach in not manufacturing the full average quantity in his lifetime, and left it to them to say whether in his lifetime he had committed any other manner of breach. The point in controversy may be stated thus: Where a lumber manufacturer contracts with a lumber merchant to sell him a certain quantity of lumber, to be made at his mill during five years, for which he is to be paid as the lumber is delivered, and he dies before the time has elapsed, are his administrators bound to fulfil the contract for the remainder of the time?

No one can trace up this branch of the law very far without becoming entangled in a thicket, from which he will have difficulty in extricating himself. Very much of the embarrassment arises from the fact that the liability of executors and administrators has been often made to depend more upon the forms of action than upon the essential relations of the parties, as will be seen by reference to the books. Platt on Covenants, 453; 2 Wms. Executors, 1060; and Viner's Ab., titles "Covenants," D. E., and "Executors," H. a.; Touchstone, 178. The simplicity and symmetry of the law would certainly be greatly increased, and its justice better appreciated if in all cases where the law undertakes the administration of estates, as in cases of insolvency, bankruptcy, lunacy, and death, the rules of distribution were the same.

The contract in this case established a defined relation, a relation depending for its origin and extent upon the intention of the parties. The question is, do the administrators of a deceased party succeed to that relation after the death of the party, or was it dissolved by that event? On this question the books give us an uncertain light. In Hyde v. Windsor (Cro. Eliz. 552) it is said that an agreement to be performed by the person of the testator, and which his executor cannot perform, does not survive. But here the uncertainty remains, for the acts which an executor cannot perform are undefined. It recognizes the principle, however, that an executor does not fully succeed to the contract relations of his testator.

The case of Robson v. Drummond (2 Barn. & Adol. 303, 22 Eng. C. L. Rep. 81) is more specific; for in that case it was held that an agreement by a coachmaker to furnish a carriage for five years and keep it in repair, was personal and could not be assigned, and executors and administrators are assigns in law (Hob. 9 b. Cro. Eliz. 757; Latch. 261; Wentw. Executors 100); that being a general term, applying to almost all owners of property or claims, whether their title be derived by act of law or of the parties. And it is no objection that one may take as executor or administrator in certain cases where the English laws of maintenance and forms of action would not allow him to take as assignee in fact, for those laws do not extend to such a case, and they have no application here.

In Quick v. Ludburrow (3 Bulst. 29) it is said that executors are bound to perform their testator's contract to build a house, but the contrary is said in Wentw. Executors, 124, Vin. Ab. "Covenant," E., pl. 12, to have been declared in Hyde v. Windsor, though we do not find it in the regular reports of the case. 5 Co. 24; Cro. Eliza. 552. But these are both mere *dicta*. The same principle is repeated in Touchstone, 178, yet even there a lessee's agreement to repair is not so construed; and in Latch. Rep. 261, the liability of executors on a contract to build is for a breach in the testator's life-

time. In Cooke v. Colcraft (2 Bl. Rep. 856), a covenant not to exercise a particular trade was held to establish a mere personal relation and not to bind executors; and the contrary is held in Hill v. Hawes, Vin. Ab., title "Executors," Y. pl. 4. And so executors and administrators stand on the same footing with assignees in fact with regard to apprentices; and contracts of this nature are held not to pass to either, because they constitute a mere personal relation, and are, therefore, not transferable; 2 Stra. 1266; 4 Ser. & R. 109; 1 Mass. 172; 19 Johns. 113; 1 Rob. 519; 12 Mod. 553, 650; 5 Co. 97.

The case most nearly resembling this is Wentworth v. Cock (10 Ad. & El. 42, 37 Eng. C. L. R. 33), where a contract to deliver a certain quantity of slate, at stated periods, was held to bind the executors. This case was decided without deliberation, and with but little argument on the part of the executors. The plaintiff relied on the case of Walker v. Hull (1 Lev. 177), where executors were held bound to supply the place of the testator in teaching an apprentice his trade. But that case had long ago been denied in England (2 Stra. 1266), and is rejected here. Commonwealth v. King, 4 Ser. & R. 109. This last case treats the contract as a mere personal one, that is dissolved by death, and regards as absurd the doctrine in Wadsworth v. Guy (1 Keb. 820, and 1 Sid. 216), that the executors are bound to maintain the apprentice, while he is discharged from duty.

But the authority principally relied on by the counsel in Wentworth v. Cock, is the Roman law, Code Just. 8, 38, 15, and the commentary on it in 1 Pothier on Oblig. 639. Yet there are few subjects in the Roman law wherein its unlikeness to ours is more marked than in the matter of succession to personal estate, and therefore its example herein is almost sure to mislead. The difference is sufficiently indicated, when we notice that the Roman executor was in all cases either the testamentary of the legal heir, and if he accepted the estate he was considered as standing exactly in the place of the decedent, and was of course bound for all his legal liabilities, including even many sorts of offenses, whether the estate was sufficient or not. He was bound as heir and by reason of the estate given to him, and not as one appointed to settle up the estate. If the heir was unwilling to accept the estate upon these terms, it became vacant, and the prætor appointed curators to administer for the benefit of all. It would seem strange that such curators should be bound to carry on the business of the deceased, where they are appointed to settle it up; yet how it really was does not appear. Dig. 427. Our statute recognizes the duty of the executor and administrator to pay all debts owing by the deceased at the time of his death, and this is the common principle. In another clause it makes the executor and administrator liable to be sued in any action, except for libels and slanders and wrongs done to the person, which might have been maintained

against the decedent if he had lived. But this furnishes us no aid in this case, and was not intended to. Its purpose is to enlarge and define the rights of action, which, existing against the individual, should survive against his estate. Not contract relations and duties, but remedies for injuries already done, are declared to survive. If the decedent committed no breach of contract, he was liable to no action when he died, and this law cannot apply.

We are then without any well-defined rule of law directly applicable to this case, and are therefore under the necessity of deducing the rule for ourselves. The elements from which this deduction is to be made are the contract itself, the ordinary principles and experience of human conduct, the decisions in analogous cases, and the nature of the office of administrator.

We repeat the question: Does such a contract establish anything more than a personal relation between the parties? This is a mere question of construction, depending upon the intention of the parties (Hob. 9; Yelv. 9; Cro. Jac. 282; 1 Bing. 225; 8 Eng. C. L. R. 307) unless the intention be such as the law will not enforce. Is it probable that either party intended to bind his executors or administrators to such a relation? The contract does not say so, and we think it did not mean it; for it would involve the intention that the administrators of one shall be lumber merchants and those of the other sawyers. The character of the contract demands not such a construction; for each delivery under it is necessarily of complete and independent articles, and each delivery was to be at once a finished work on each side. There may be cases when it is necessary that the executor or administrator shall complete a work already begun by the decedent, and then they may recover in their representative character. 1 Crompt. & Mees. 403; 3 Mees. & W. 350; 2 Id. 190; 3 W. & Ser. 72. But here every act of both parties was complete in itself. From the contract itself, and from the ordinary principles of human conduct, we infer that neither party intended the relation to survive.

A contrary view is incompatible, in the present case, with the office of administrator; for it would require him to have the possession of the saw-mill in order to fulfill the contract; and yet administrators have nothing to do with the real estate, unless the personal estate is insufficient to pay the debts, and therefore they cannot perform. It is incompatible with the general duties of administrators, in that it would require them to carry on the business left by the decedent, instead of promptly settling it up; it would require him to satisfy claims of this character within a year, or begin to do so, while the law forbids him to do so except at his own risk; and it might hang up the estate to a very protracted period. We are therefore forbidden to infer such an intention, and possibly to enforce it even if it appeared.

The inference is further forbidden by the spirit of analogous cases. It would seem absurd to say that the administrator of a physician, or author, or musician could be compelled to perform their professional engagements, no matter how the contract might be expressed. The idea is ludicrous. Yet it has been supposed that an administrator might take the place of his intestate in teaching an apprentice to be a surgeon, or saddler, or shoemaker, or mariner, or husbandman, or in demanding services from an ordinary laborer; but the idea was rejected by the court. On what ground? Most certainly not that no one else could be got to take the place of the decedent; but on the ground that no such substitution was intended by the contract, together perhaps with the feeling of the incompatibility of such a substitution with the duties imposed by law upon administrators. The law trusts people to settle up estates on account of their honesty and general business capacity, and not for any peculiar scientific or artistic skill, and the State does not hold itself bound to furnish such abilities. Some people may suppose that it requires no great skill to manufacture boards, if one has the material and machinery; but still we cannot suppose that the deceased was contracting for any kind of skill in his administrators. For these reasons the court below was right in declaring in substance, that the administrators were liable only for breaches committed by the intestate in his lifetime, and the same principle applies to the death of either party. These views set aside some of the exceptions as entirely unimportant, and in the others we discover no error, and no principle that calls for any special remarks.

Judgment affirmed.[1]

9 Cyc. 632–633 (96–99, 1); 26 Cyc. 985–986 (14–21); 23 L. R. A. 707; W. P. 543 (28).

[1] In Chamberlain v. Dunlop, 126 N. Y. 45, the court said: "The presumption is that the party making a contract intends to bind his executors and administrators, unless the contract is of that nature which calls for some personal quality of the testator, or the words of the contract are such that it is plain no presumption of the kind can be indulged in. Tremeere v. Morison, 1 Bing. [N. C.] 89; Reid v. Tenterden, 4 Tyrwhitt, 111; Kernochan v. Murray, 111 N. Y. 306.) Where a party has entered into a contract to purchase real estate and dies before it is conveyed to him and before he has paid for it, his heir or devisee is entitled to have his executor pay for the realty out of the personal estate. (Broome v. Monck, 10 Ves. 596, 611; re-argued, 619; Livingston v. Newkirk, 3 Jo. Ch. 312; Wright v. Holbrook, 32 N. Y. 587; 1 Sugden on Pow. [8th Am. ed.] 293; 3 Red. on Wills [2 ed.] 302, § 11.) The executor is not permitted to violate the contract of his testator after the latter's death. (Wentworth v. Cock, 10 Ad. & El. 42; Siboni v. Kirkman, 1 M. & W. 419; remarks of Parke, B.) In Quick v. Ludburrow (3 Bulst. 30), Lord Coke said that if a man be bound to build a house for another before such a time and he which is bound dies before the time, his executors are bound to perform this. To same effect, Tilney v. Norris (1 Ld. Raym. 553); Tremeere v. Morison and

LACY *v.* GETMAN, as Executrix.

119 NEW YORK, 109.—1890.

FINCH, J. . . . The facts are few and undisputed on this appeal. The plaintiff, Lacy, contracted orally with defendant's testator, McMahan, to work for the latter upon his farm, doing its appropriate and ordinary work for a period of one year at a compensation of $200. Lacy entered upon the service in March, doing from day to day the work of the farm under the direction of its owner, until about the middle of July, when McMahan died. By his will he made the defendant executrix, but devised and bequeathed to his widow a life estate in the farm, and the use and control of all his personal property whatsoever in the house and on the farm, during the term of her natural life. Lacy knew in a general way the terms of the will. He testifies that he knew that it gave to the widow the use of the farm, and that she talked with him about the personal property. It is admitted that the executrix did not hire or employ him, but he continued on to the close of the year, doing the farm work under the direction of the widow until the end of his full year. He sued the executrix upon his contract with the testator, and has recovered the full amount of his year's wages. From that decision the executrix appeals, claiming that the judgment should have been limited to the proportionate amount earned at the death of McMahan, and that the death of the master dissolved the contract.

It is obvious at once that an element has come into the case as now presented, which was not there when the General Term first held that the contract survived. It now appears that the executrix could not have performed her side of the contract at all after the death of McMahan, by force of her official authority, because she had neither the possession of the farm nor personal property upon it, and no right to such possession during the life of the widow. She had no power to put her servant upon the land, or employ him about it, and in her representative character she had not the slightest interest in his service, and could derive no possible benefit from it. The plaintiff's labor, after the death of McMahan, was necessarily on the farm of the widow, by her consent, for her benefit, and under her direction and control, and equitably and justly should be a charge

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Reid v. Tenterden (*supra*). If the testator devise his land to other parties, the executor still remains liable on the covenant of his testator. If the devisees do not permit the executor to build, the covenant is broken, and it is the act of the devisor in devising his property thus that prevents the executor from fulfilling. If the land descended to the heir, then the covenant still remains in force; and if it should be that the executor could not force the heir to permit the building, still the estate is liable on the covenant, and the executor must pay the damages if he have assets."

against her alone. The test of power to perform on the part of the personal representative of the deceased fails in the emergency presented by the facts, except possibly upon proof of the consent of the widow.

We have then the peculiar case of a contract made to work for McMahan and under his direction and control, which could not be performed because of his death, transmuted into a contract to work for Mrs. Getman upon a farm which she did not possess and had no right to enter, and performed by working for the widow and under her direction and control alone, and this because of the supposed rule that the contract survived the death of the master and remained binding upon his personal representatives.

It is true that some interest in the personal property on the farm is claimed to have vested in the executrix, notwithstanding the terms of the will, and the inventory filed by her is appealed to, and the necessity of a resort to the personal property with which to pay debts. There is no proof that the testator owed any debts, and the inventory covers nothing as to which Lacy's labor was requisite or necessary, except possibly some corn on the ground valued at $18. All the grain inventoried was in the barn, needing only to be threshed, and must be assumed to have been there when testator died; and the other property consisted of farm tools and a cow and horse, to the use of which the widow was entitled and which, if sold to pay possible debts, would have left the servant without means of doing his work and with nothing to do unless for the widow. So that the bald question is presented whether the contract survived the testator's death and bound his executrix, who was without power or authority of her own to perform, and had no interest in performance.

It seems to be conceded that the death of the servant dissolves the contract. Wolfe v. Howes, 20 N. Y. 197; Spaulding v. Rosa, 71 N. Y. 40; Devlin v. Mayor, etc., 63 N. Y. 14; Fahy v. North, 19 Barb. 341; Clark v. Gilbert, 32 Barb. 576; Seymour v. Cagger, 13 Hun, 29; Boast v. Firth, L. R. (4 C. P.) 1. Almost all of these cases were marked by the circumstance that the services belonged to the class of skilled labor. In such instances the impossibility of a substituted service by the representative of the servant is very apparent. The master has selected the servant by reason of his personal qualifications, and ought not, when he dies, to abide the choice of another or accept a service which he does not want. While these cases possess, with a single exception, that characteristic, I do not think they depend upon it. Fahy v. North was a contract for farm labor, ended by the sickness of the servant, and quite uniformly the general rule stated is that the servant's agreement to render personal services is dissolved by his death. There happens a total inability to perform; it is without the servant's fault, and so further perform-

ance is excused and the contract is apportioned. If in this case Lacy had died on that day in July, his representative could not have performed his contract. McMahan, surviving, would have been free to say that he bargained for Lacy's services, and not for those of another selected and chosen by strangers, and either the contract would be broken or else dissolved. I have no doubt that it must be deemed dissolved, and that the death of the servant, bound to render personal services under a personal control, ends the contract, and irrespective of the inquiry whether those services involve skilled or common labor. For even as it respects the latter, the servant's character, habits, capacity, industry, and temper, all enter into and affect the contract which the master makes, and are material and essential where the service rendered is to be personal and subject to the daily direction and choice and control of the master. He was willing to hire Lacy for a year, but Lacy's personal representative, or a laborer tendered by him, he might not want at all and at least not for a fixed period, preventing a discharge. And so it must be conceded that the death of the servant, employed to render personal services under the master's daily direction, dissolves the contract. Babcock v. Goodrich, 3 How. Pr. (N. S.) 53.

But if that be so, on what principle shall the master be differently and more closely bound? And why shall not his death also dissolve the contract? There is no logic and no justice in a contrary rule. The same reasoning which relieves the servant's estate relieves also the master's, for the relation constituted is personal on both sides and contemplates no substitution. If the master selects the servant, the servant chooses the master. It is not every one to whom he will bind himself for a year, knowing that he must be obedient and render the services required. Submission to the master's will is the law of the contract which he meditates making. He knows that a promise by the servant to obey the lawful and reasonable orders of his master within the scope of his contract is implied by law, and a breach of this promise in a material matter justifies the master discharging him. King v. St. John, Devizes, 9 B. & C. 896. One does not put himself in such relation for a fixed period without some choice as to whom he will serve. The master's habits, character, and temper enter into the consideration of the servant before he binds himself to the service, just as his own personal characteristics materially affect the choice of the master. The service, the choice, the contract are personal upon both sides, and more or less dependent upon the individuality of the contracting parties, and the rule applicable to one should be the rule which governs the other.

If now to such a case—that is, to the simple and normal relation of master and servant, involving daily obedience on one side and constant direction on the other—we apply the suggested test of possibility

of performance in substantial accord with the contract, the result is not different. It is said that if the master dies his representatives have only to pay, and any one may do that. But under the contract that is by no means all that remains to be done. They must take the place of the master in ordering and directing the work of the farm, and requiring the stipulated obedience. That may prove to effect a radical change in the situation of the servant, as it seems to have done in the present case, leading the plaintiff to the verge of refusing to work further for either widow or executrix, whose views apparently jangled. The new master cannot perform the employer's side of the contract as the deceased would have performed it, and may vary so far from incapacity or fitful temper or selfish greed, as to make the situation of the servant materially and seriously different from that which he contemplated and for which he contracted.

We are, therefore, of opinion that in the case at the bar the contract of service was dissolved by the death of McMahan, and his estate was only liable for the services rendered to the date of his death. The judgment should be reversed and a new trial granted with costs to abide the event. All concur. Judgment reversed.

CHAPTER III.

JOINT OBLIGATIONS.

Joint promises.

(*i.*) *Joint promisors.*

BRAGG *v.* WETZELL.

5 BLACKFORD (IND.), 95.—1839.

BLACKFORD, J. This was an action of debt for money lent, brought by Zacheus Wetzell against Wilson Bragg. The suit originated before a justice of the peace. The justice gave judgment for the plaintiff, and the defendant appealed.

In the Circuit Court, the defendant moved to dismiss the cause, on the ground that one Smith ought to have been joined as a defendant in the suit. The motion was overruled. The cause was submitted to the court, and a judgment rendered for the plaintiff.

The writ was issued against Bragg alone. The declaration is as follows:

"The plaintiff complains of Wilson Bragg and Seneca Smith, partners, trading under the firm of Bragg & Smith, of a plea that they render unto him $100, which to him they owe, and from him unjustly detain; for that whereas the defendants, heretofore, to wit, on the 27th of June, 1837, at, etc., were justly indebted to the plaintiff in the sum of $100, for so much money lent to the defendants by the plaintiff, and at their special instance and request; yet the defendants, though often requested, have not, nor has either of them, paid the said sum of money, or any part thereof, to the plaintiff, but to pay the same and every part thereof, the defendants have at all times refused, and still do refuse, to the damage," etc.

The plaintiff here shows by his declaration, that Smith, who is not sued, is a joint party to the contract with the defendant, and that Smith is living. It is impossible, under these circumstances, that the plaintiff can recover. It is true, that since the case of Rice v. Shute (5 Burrow, 2611), the facts that there is a joint contractor not sued, and that he is alive, are generally required to be pleaded in abatement; but that rule has no application to cases like the one before us. Here the plaintiff, in his declaration, admits those facts, and shows that he has no right to sue the defendant alone. The suit should have been dismissed. The non-joinder in such a case as this, may be taken advantage of on a motion in

arrest of judgment. Saund. 291 b, note 4. Or it may be assigned for error. Chitty's Plead. 53.

The judgment is reversed and the proceedings subsequent to the motion to dismiss the cause set aside, with costs. Cause remanded, etc.[1]

9 Cyc. 653 (23); 654–655 (34–39); 706–707 (37–43).

HALE *v.* SPAULDING *et al.*

145 MASSACHUSETTS, 482.—1888.

Contract upon an instrument under seal by which the defendants, six in number, agreed to pay the plaintiff, on demand, six-sevenths of any loss which he might suffer as indorser of a certain note.

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[1] In City of Philadelphia v. Reeves and Cabot, 48 Pa. St. 472, the court said: "It is a general presumption of law, when two or more persons undertake an obligation, that they undertake jointly. Words of severance are necessary to overcome this primary presumption. In all written contracts, therefore, whether the liability incurred is joint or several, or joint and several, is to be determined by looking at the words of the instruments and at them alone. The subject-matter of the contract, and the interests of the parties assuming a liability, have nothing to do with the question. It may be otherwise with respect to the rights of the covenantees, where there are more than one. There are not wanting cases in which it has been held that when the interests of the covenantees are several, they may sue severally, though the terms of the covenant upon which they sue are strictly joint. Even this, however, has been doubted. But, however, it may be with the rights of covenantees, it is a settled rule that whether the liability of covenantors is joint, or several, or both, depends exclusively upon the words of the covenant. And the language of severalty or joinder is the test. The covenant is always joint, unless declared to be otherwise. Enys v. Donnithorne, 2 Burrows, 1190; Philips v. Bonsall, 2 Binn. 138." But contracts which would be joint by the common law are, in many States, required by statute to be construed as joint and several. Stimson's Am. St. L., § 4113.

In Cowley v. Patch, 120 Mass. 137, the court said: "In order to maintain an action on a joint contract, whether the action is brought against one or both of the joint contractors, it is necessary to prove the liability of both; for if one only is, or ever was, liable there is not a joint, but only a several liability, and a variance from the cause of action declared on. For example, if one joint contractor is sued alone, and does not plead in abatement the non-joinder of the other, and judgment is rendered against the one sued, it merges the cause of action against him, and (unless otherwise provided by statute) as the two are no longer jointly liable, prevents a subsequent recovery against the other joint contractor. Ward v. Johnson, 13 Mass. 148; King v. Hoare, 13 M. & W. 494; Mason v. Eldred, 6 Wall. 231. So if, in such an action, the judgment is for the defendant, upon the ground that there is no joint liability, it is a bar to a subsequent action against the other contractor upon the joint contract. Phillips v. Ward, 2 H. & C. 717."

A joint demand cannot be set off against a separate demand.—Elliott v. Bell, 37 W. Va. 834.

Defendant Saltmarsh filed an answer alleging that, since the execution of the instrument sued on, plaintiff had executed and delivered the following instrument, under seal, to one of the joint obligors:

"Received of L. V. Spaulding $1060.84, in full satisfaction for his liability on the document," etc. (describing it).

It appeared in evidence that plaintiff had settled with each of the defendants, except Saltmarsh, for their proportionate part of the liability, and executed the paper to Spaulding. Plaintiff offered to prove that there was no intention to release Saltmarsh, but the court held the offer immaterial, and directed a verdict for defendant.

C. ALLEN, J. The words "in full satisfaction for his liability" import a release and discharge to Spaulding, and, the instrument being under seal, it amounts to a technical release. The plaintiff does not controvert the general rule, that a release to one joint obligor releases all. Wiggin v. Tudor, 23 Pick. 434, 444; Goodnow v. Smith, 18 Pick. 414; Pond v. Williams, 1 Gray, 630, 636. But this result is avoided when the instrument is so drawn as to show a contrary intention. 1 Lindl. Part. 433; 2 Chit. Con. (11th Am. ed.) 1154 *et seq.;* Ex parte Good, 5 Ch. D. 46, 55. The difficulty with the plaintiff's case is, that there is nothing in the instrument before us to show such contrary intention. Usually a reservation of rights against other parties is inserted for that purpose; or the instrument is put in the form of a covenant not to sue. See Kenworthy v. Sawyer, 125 Mass. 28; Willis v. De Castro, 4 C. B. (N. S.) 216; North v. Wakefield, 13 Q. B. 536, 541. Parol evidence to show the actual intention is incompetent. Tuckerman v. Newhall, 17 Mass. 580, 585. The instrument given in this case was a mere receipt under seal of money form one of several joint obligors, in full satisfaction of his liability on the document signed by himself and others. There is nothing to get hold of to show an intent to reserve rights against the others. He might already have discharged each of them by a similar release.

Exceptions overruled.[1]

9 Cyc. 654 (31); 22 H. L. R. 458; 8 C. L. R. 591; 12 C. L. R. 753; Williston, Releases and covenants not to sue joint, or joint and several debtors, 25 H. L. R. 203.

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[1] Nothing short of a *technical* release under seal will operate to discharge a joint obligor. Rowley v. Stoddard, 7 Johns. 210; Catskill Bank v. Messenger, 9 Cow. 38; Crane v. Alling, 15 N. J. L. 423; Kidder v. Kidder, 33 Pa. St. 268, *post*, p. 707. Though if the release be upon payment in full by one of the joint obligors, the result would seem to be otherwise. Goss v. Ellison, 136 Mass. 503. The rule has been modified by statute in some States. Stimson's Am. St. L., § 5013.

"A covenant not to sue a sole debtor may be pleaded as a general release in bar, to avoid circuity of action. But if he be one of two or more debtors, such covenant cannot be pleaded in bar, and if he should be sued contrary to

HAIGHT, J., IN GILBERT *v.* FINCH, *et al.*

173 NEW YORK, 455.—1903.

In considering the effect of the release we shall assume that the defendants were joint tort feasors with the Maine incorporators, and that the release, under seal, of a claim given to one joint tort feasor operates as a release of all. (Barrett v. Third Ave. R. R. Co., 45 N. Y. 628, 635, and cases there cited.) This rule is founded upon the theory that a party is entitled to but one satisfaction for the injury sustained by him. The claim of the plaintiff, as we have seen, was for thirty-five thousand dollars; the settlement was for twenty-five thousand dollars, leaving ten thousand dollars of the original claim unpaid and unsatisfied. The instrument given to the Maine incorporators upon the settlement of the plaintiff's suit against them released and discharged them from all further claims or demands, so far as the plaintiff was concerned, but it was expressly provided

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the terms of it, he must pursue his remedy by an action upon the covenant." —Wells, J., in McAllester v. Sprague, 34 Me. 296, 298.

A judgment rendered against one of several joint debtors in an action against him alone is a bar to an action against the others. Mason v. Eldred, 6 Wall. 231; Candee v. Smith, 93 N. Y. 349; Heckemann v. Young, 134 N. Y. 170. See Stimson's Am. St. L., § 5015, for statutory modifications.

The death of one of several joint debtors extinguishes the liability as to him and the survivors alone are liable. Yorks v. Peck, 14 Barb. (N. Y.) 644; Foster v. Hooper, 2 Mass. 572. *Contra:* Eldred v. Bank, 71 Ind. 543; and the common law rule has now been generally modified by statute. Stimson's Am. St. L., § 4113.

Revival of debt which has been barred by the statute of limitations.—In Shoemaker v. Benedict, 11 N. Y. 176, the court said: "The only question then is, whether the joint contract creates an agency in one of several joint debtors to continue a debt or renew a debt already barred against all, and prevent the statute of limitations from attaching by a new promise, express or implied. . . . The cases in England, and in this State prior to Van Keuren v. Parmelee [2 Comst. 523], have followed the case of Whitcomb v. Whiting [Doug. 652], and held that such agency did exist. . . . The decision of the court in Van Keuren v. Parmelee, without reference to the reasoning of the judge, by whom the opinion was delivered, necessarily decides or recognizes as law: 1st. That the action is substantially, though not in form, upon the new promise, and that such promise is not a mere continuation of the original promise, but a new contract springing out of and supported by the original consideration; 2d. That to continue or renew the debt, there must be an express promise to pay or an acknowledgment of the existence of the debt, with the admission or recognition of an existing liability to pay it from which a new promise may be inferred; 3d. That such an acknowledgment or promise, to take a debt out of the statute, must be made by the party to be charged or by some person authorized by him; and 4th. That there is no mutual agency between joint debtors by reason of the joint contract, which will authorize one to act for and bind the others in a manner to vary or extend their liability." See 25 Cyc. 1356 (48–55).

in the instrument that it should not affect any cause of action on behalf of the receiver against any other person. The purpose of this reservation is very evident. The receiver, doubtless, intended to pursue the defendants for the balance of the claim. The instrument, therefore, does not purport, neither was it intended, to be a full and complete settlement of the plaintiff's entire claim. Reservations of this character in releases are not uncommon, and their effect has been the subject of frequent adjudications by the courts. It is quite true that the courts of our sister States have reached different conclusions upon the question, and that a sharp conflict exists in the courts of our own State, as, for instance, Matthews v. Chicopee Mfg. Co. (3 Robt. 712); Commercial Nat. Bank v. Taylor (64 Hun, 499), on one side, and Mitchell v. Allen (25 Hun, 543); Delong v. Curtis (35 Hun, 94), and Brogan v. Hanan (55 App. Div. 92) upon the other side.

In England the modern authorities appear to be quite uniform upon the question. They are to the effect that, as between joint debtors and joint tort feasors, a release given to one releases all; but if the instrument contains a reservation of a right to sue the other joint debtor or tort feasors, it is not a release, but in effect is a covenant not to sue the person released, and a covenant not to sue does not release a joint debtor or a joint tort feasor.

In the case of Duck v. Mayeu (L. R. [2 Q. B. 1892] 511) the question was as to whether the plaintiff had released a joint tort feasor. He had accepted from one a sum of money, but without prejudice to his claim against the other. Smith, L. J., in delivering the opinion of the court, said with reference thereto: "In determining whether the document be a release or a covenant not to sue, the intention of the parties was to be carried out, and, if it were clear that the right against a joint debtor was intended to be preserved, inasmuch as such right would not be preserved if the document were held to be a release, the proper construction, where this was sought to be done, was that it was a covenant not to sue, and not a release. In the case of Bateson v. Gosling, at Nisi Prius, the same canon of construction was applied, and it was held that, the release being, as it was, limited by a proviso reserving rights against the surety, it must be taken that it was a covenant not to sue, and not a release; and this ruling was unanimously upheld by the Court of Common Pleas, as reported in Law Rep. 7 C. P., p. 9."

In Brice v. Barker (4 Ellis & Bl. 760 [E. C. L. R. vol. 82]) Coleridge, J., says: "With regard to the first question, two modes of construction are for consideration. One, that, according to the earlier authorities, the primary intention of releasing the debt is to be carried out, and the subsequent provision for reserving remedies against co-obligors and co-contractors should be rejected as inconsistent with the

intention to release and destroy the debt evinced by the general words of the release, and as something which the law will not allow, as being repugnant to such release and extinguishment of the debt. The other, that, according to the modern authorities, we are to mould and limit the general words of the release by construing it to be a covenant not to sue, and thereby allow the parties to carry out the whole of their intentions by preserving the rights against parties jointly liable. We quite agree with the doctrine laid down by Lord Denman in Nicholson v. Revill (4 A. & E. 675 [E. C. L. R. vol. 31], as explained by Baron Parke in Kearsley v. Cole, 16 M. & W. 136) that, if the deed is taken to operate as a release, the right against a party jointly liable cannot be preserved; and we think that we are bound by modern authorities (see Solly v. Forbes, 2 Br. & B. 38 [E. C. L. R. vol. 6], Thompson v. Lack, 3 Com. B. 540 [E. C. L. R. vol. 54], and Payler v. Homersham, 4 M. & S. 423 [E. C. L. R. vol. 30]) to carry out the whole intention of the parties as far as possible, by holding the present to be a covenant not to sue, and not a release." (See, also, Curry v. Armitage, 6 Weekly Repr. [Eng.] 516.)

[The court here states McCrillis v. Hawes, 38 Me. 566; Ellis v. Esson, 50 Wis. 138; Sloan v. Herrick, 49 Vt. 327.]

We have thus called attention to the English authorities and those of some of our sister States. We have also referred to some of the conflicting cases in our own courts. The question appears to have first received attention here in Kirby v. Taylor (6 Johns. Ch. 250, 253) in which it was held that a release is to be construed according to the clear intention of the parties, and where it contains a reservation, the other obligee was not discharged.

In the case of Irvine v. Milbank (56 N. Y. 635), more fully reported in 15 Abb. Pr. [N. S.] 378 the release was, by its terms, to be without prejudice to the rights of the plaintiff as against the other defendants. Folger, J., in delivering the opinion of the court, said that this instrument was not a technical release, which it must be to operate as a discharge of a joint tort feasor.

And finally, in the case of Whittemore v. Judd Linseed & Sperm Oil Co. (124 N. Y. 565), the question was examined by Brown, J., and the conclusion reached that where a release of one of two joint debtors contains an express provision that it shall not affect or impair the claim of the creditor against the other debtor, the latter is not discharged.

It thus appears that the decisions of this court are in accord with the English rule and in harmony with our statute in reference to joint debtors. (Code Civ. Pro. §§ 1942, 1944.) They give force and effect to the intention of the parties to the instrument, which, we think, is more just and the wiser and safer rule. Where the release contains no reservation it operates to discharge all the joint tort

feasors; but where the instrument expressly reserves the right to pursue the others it is not technically a release but a covenant not to sue, and they are not discharged. It follows that the release, so called, did not operate to discharge the defendants.

The order of the Appellate Division should be affirmed and judgment absolute ordered in favor of the plaintiff upon the stipulation, with costs.

Parker, Ch. J., Gray, Bartlett, Cullen, and Werner, JJ., concur; O'Brien, J., absent.

Order affirmed.

9 Cyc. 654 (31); 16 H. L. R. 529.

JEFFRIES *v.* FERGUSON, Administrator.

87 MISSOURI, 244.—1885.

BLACK, J. C. S. Jeffries and James N. Inge were sureties on a note given by Chas. R. Jeffries to one Roberts. Before and after judgment on the note, C. S. Jeffries paid off the debt, and then presented his demand to the Probate Court, asking to have the one-half of the amount so paid, first deducting the proceeds of certain securities, allowed against the estate of Inge, the co-surety. The contention that plaintiff could only sue in a court having a full and complete equity jurisdiction is not well taken. Courts of law have adopted the equitable doctrine of contribution, and award relief to one surety who has paid more than his share. The surety paying the debt may have his action at law against the other surety for any excess which he has paid over his porportionate share. Van Petten v. Richardson, 68 Mo. 380. The plaintiff's demand was allowed by the Probate Court, and he again recovered in the Circuit Court, to which the case was appealed. We have examined the evidence and are satisfied the estate received all credits to which it was entitled.

The judgment is affirmed. All concur.[1]

9 Cyc. 794 (2-3); 796 (11-17).

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[1] "Contribution is not founded upon, although it may be modified by, contract. The right to it is as complete in the case where the sureties are unknown to each other, as in any other. The law following equity will imply a promise to contribute, in order to afford a remedy. But as this is in most instances a fiction, in aid of an equitable right, it will never be tolerated where the relation upon which the equity is founded is wanting."—Gardiner, C. J., in Tobias v. Rogers, 13 N. Y. 59, 66.

"An action at law by a surety for contribution must be against each of the sureties separately for his proportion, and no more can be recovered, even where one or more are insolvent. In the latter case, the action must be in equity against all the co-sureties for contributions, and, upon proof of the insolvency of one or more of the sureties, the payment of the amount will be

(*ii.*) *Joint promisees.*

SWEIGART *v.* BERK *et al.*

8 SERGEANT & RAWLE (PENN.), 308.—1822.

Action of debt on a bond. Judgment for plaintiffs.

The bond was given by defendant to "the widow and heirs and legal representatives of Peter Berk, deceased," conditioned to be void "if the said Sweigart should pay to the said widow and heirs and legal representatives of the said Peter Berk one thousand pounds, gold or silver coin, lawful money of Pennsylvania, at or immediately after the death of Margaret Berk, widow of the said Peter Berk, deceased, or to the said deceased's heirs or representatives, in equal shares alike, with lawful interest for the same to be paid annually unto the said Margaret Berk, during her natural life," etc.

The statement of the cause of action averred the death of Margaret Berk, and that the plaintiffs were seven of the ten children of Peter Berk, and each entitled to one hundred pounds of the one thousand pounds promised by defendant.

TILGHMAN, C. J. It appears by the plaintiffs' own showing, that the bond was given to *ten* obligees jointly, all of whom are living, and the action is brought by only *seven* of them. I am at a loss to conceive on what principle the action can be supported. It is well settled that if a bond be given to several obligees they must all join in the action, unless some be dead, in which case that fact should be averred in the declaration. And if it appear on the face of the pleadings that there are other obligees living who have not joined in the action, it is fatal, on demurrer or in arrest of judgment. The authorities on this point are numerous, and will be found collected in 1 Saund. 291 f. The counsel for the plaintiffs has urged the inconvenience of this principle when applied to the bond in suit, where

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adjudged among the solvent parties in due proportion."—Miller, J., in Easterly v. Barber, 66 N. Y. 433, 439.

"We have often held, as between the creditor and the estate of a deceased surety, that the joint obligation of the latter ended with his death. We are not yet prepared to decide that his several obligation, originating at the date of the common signature, to contribute ratably to the payments compelled from his associates, also terminates at his death. . . . The justice of such a rule is apparent. Originating in equity, it has been grafted upon the law with the aid of an implied promise to secure the legal remedy. We see no reason to reverse it, but every consideration of equity and justice leads us rather to maintain and enforce it."—Finch, J., in Johnson v. Harvey, 84 N. Y. 363, 366, 367.

"It is well settled that one surety has a claim against another, for contribution for any sum he may be compelled to pay, although such co-surety may have been discharged from liability primarily upon the same contract." —Peters, J., in Hill v. Morse, 61 Me. 541, 544.

it appears, by the condition, that ten persons have separate interests, and it may be that some of them have received their shares before the commencement of this suit. There is very little weight in that argument. The acceptance of the bond was the voluntary act of the obligees, and if people will enter into contracts which are attended with difficulties, they have no right to expect that established principles of law are to be prostrated for their accommodation. But in truth, there is very little difficulty in the case. The action may be brought on the penalty of the bond, in the name of all the obligees, and the judgment entered in such a manner as to secure the separate interest of each. The action may be supported although *some* of the obligees have received their shares, because the bond is forfeited unless they have *all* been paid.

It was objected that those who had been paid might refuse to join in the action, or might release the obligor. But the court would permit those who are unpaid to make use of the names of the other obligees, against their consent; neither would their release be suffered to be set up in bar of the action. It may be resembled to the case of an assigned chose in action, where the action is brought in the name of the assignor, for the use of the assignee; there the release of the assignor would not be regarded. A release, in such case, would be a collusion between the assignor and assignee [debtor] to defraud a third person, and therefore void. It is unnecessary to decide whether each of the obligees, in the present case, could have supported a separate action for his separate interest, appearing on the face of the condition. I will only say that such an action would be hazardous. But this action has not been brought for the separate interest of any one. Seven of the obligees have joined in it. So that it is neither joint nor several. On no principle, therefore, can the action be supported. There were several other points discussed in the argument, in which the court will give no opinion.

The judgment of the Court of Common Pleas must be reversed, and restitution awarded.

Judgment reversed and restitution awarded.[1]

9 Cyc. 655–656 (40–42); 703 (15).

[1] A release by one of several joint promisees is, in the absence of collusion and fraud, a bar to an action by the others. Pierson v. Hooker, 3 Johns. (N. Y.) 68; People *ex rel* Eagle v. Keyser, 28 N. Y. 228; Myrick v. Dame, 9 Cush. (Mass.) 248.

Upon the death of a joint promisee the right of action vests in the survivors. Crocker v. Beal, 1 Lowell (U. S. C. C.), 416; Murray v. Mumford, 6 Cow. (N. Y.) 441; Indiana &c. Ry. v. Adamson, 114 Ind. 282; Donnell v. Manson, 109 Mass. 576.

Joint and several promises.

(*i.*) *Joint and several promisors.*

CUMMINGS *et al. v.* THE PEOPLE, &c.

50 ILLINOIS, 132.—1869.

Action of debt on a sheriff's bond. Judgment for plaintiff.

The declaration averred five obligors, but no process issued against one of them.

Mr. Chief Justice Breese. . . . The next objection is, that as the bond in suit was a joint and several bond, suit should be brought against all the obligors, or against each co-obligor severally, and not against an intermediate number.

There is no averment in the declaration that Argo was dead at the time of the commencement of the suit. The rule is, if one of the joint obligors be dead, it is not necessary to notice him in the declaration, nor need the survivors be declared against as such, but they may be sued, as if they alone were primarily liable. 1 Ch. Pl. 43. To the same effect is Richard's v. Heather, 1 Barn. & Ald. 29, and Mott v. Petrie, 15 Wend. 318. The reason is obvious. The rule being that on a joint and several obligation, executed by more than two persons, one may be sued, or all, but not an intermediate number; therefore, if one of the co-obligors be not named in the declaration, those who are sued may plead the fact in abatement. To such a plea the plaintiff could reply, that such co-obligor was dead before the commencement of the suit, as that would be a matter *in pais*.

It is averred, in this declaration, that Argo executed the bond as one of the sureties; but the defendants in error say, in the brief of counsel, that he was dead at the time the suit was commenced. If this was so, then it should not have been alleged in the declaration that he executed the bond, but having alleged it the question is presented, is not the declaration defective by reason of his non-joinder in the action, and cannot advantage be taken of it by motion in arrest of judgment, or an error?

The defendants in error contend that, though Argo might be living, and should have been made a party, it is too late now to make the objection—it should have been made by plea in abatement, and cannot be raised on error.

It is admitted, if the defendants in error had not alleged in their declaration that the defendants therein, together with Argo, executed the bond, the defendants would have been required to plead his non-joinder in abatement. But the fact appears on the face of the declaration; a plea, therefore, was not necessary to bring it before the court. Why inform the court by plea of a fact which the

plaintiff himself places on the record? This defect in the declaration could have been reached by general demurrer, or by motion in arrest of judgment, and can now be availed of on error.

Plaintiffs, by their own showing, inform the court there is another joint obligor, who has not been joined in the action; it was patent of record, and no plea was necessary to bring the fact before the court. 1 Ch. Pl. 46; 2 Sanders, 9, note 10 to the case of Jefferson v. Morton *et al.;* Cobell v. Vaughan, 1 Id. 291, in note; Whitaker v. Young, 2 Cowen, 569; Horner v. Moor, cited in 5 Burrow, 2614; Leftwich v. Berkeley, 1 Hen. & Munf. 61; Newell v. Wood, 1 Munf. 555; Harwood *et al.* v. Roberts, 5 Maine, 441.

The rule is well settled that matters *in pais* only need be pleaded. This is matter of record.

This record shows a joint and several bond executed by five persons, four of whom are sued. This appearing on the face of the declaration, the case is brought within the principle of the cases above cited, and about which there can be no doubt.

For this error the judgment must be reversed.

Judgment reversed.[1]

9 Cyc. 657-658 (52-53); 708 (51-52).

BANGOR BANK *v.* TREAT *et al.*

6 GREENLEAF (6 MAINE), 207.—1829.

MELLEN, C. J. This is an action of assumpsit and the declaration states that the note was signed by the defendants and Allen Gilman jointly and severally; and that a judgment had been recovered on the note against Gilman in a several action against him. The defendants have moved in arrest of judgment on account of the joinder of them in the present suit.

When three persons by bond, covenant, or note jointly and severally contract, the creditor may treat the contract as joint or several at his election, and may join all in the same action or sue each one severally; but he cannot, except in one case, sue two of the three, because that is treating the contract neither as joint or several. But if one of the three be dead, and that fact be averred in the declaration, the surviving two may be joined.

In the present case Gilman is living. The plaintiffs contend that as judgment had been recovered against him, such judgment entitled them to join the other two in the same manner as though he was dead.

[1] "The rule is elementary that when an obligation is joint as well as several, all must be proceeded against jointly, or each severally. There is no authority for suing three out of four joint makers."—Champlin, J., in Fay & Co. v. Jenks & Co., 78 Mich. 312.

This is not so. When they sued Gilman alone, they elected to consider the promise or contract as several; and having obtained judgment they are bound by such election. In case of death, the act of God has deprived the party of the power of joining all the contractors, but he may still consider the contract as joint, and sue the surviving two.

The plaintiffs have disabled themselves from maintaining this action by their former one. 1 Saund. 291 e. The objection is good on arrest of judgment where the fact relied on by the defendants appears on the record, as in the present case.

Judgment arrested.[1]

9 Cyc. 657–658 (52–57); 708 (51–52).

[1] In Sessions v. Johnson, 95 U. S. 347, the court said: "Even without satisfaction, a judgment against one of two joint contractors is a bar to an action against the other, within the maxim *transit in rem judicatum;* the cause of action being changed into matter of record, which has the effect to merge the inferior remedy in the higher. King v. Hoare, 13 M. & W. 504. Judgment in such a case is a bar to subsequent action against the other joint contractor because, the contract being merely joint, there can be but one recovery, and consequently the plaintiff, if he proceeds against one only of two joint promisors, loses his security against the other, the rule being that by the recovery of the judgment the contract is merged, and a higher security substituted for the debt. Robertson v. Smith, 18 Johns. (N. Y.) 477; Ward v. Johnson, 13 Mass. 149; Cowley v. Patch, 120 Id. 138; Mason v. Eldred *et al.*, 6 Wall. 231. But the rule is otherwise where the contract or obligation is joint and several, to the extent that the promisee or obligee may elect to sue the promisors or obligors jointly or severally; but even in that case the rule is subject to the limitation, that if the plaintiff obtains a joint judgment, he cannot afterwards sue them separately, for the reason that the contract or bond is merged in the judgment; nor can he maintain a joint action after he has recovered judgment against one of the parties in a separate action, as the prior judgment is a waiver of his right to pursue a joint remedy.".

But in People v. Harrison, 82 Ills. 84, the court said: "Contracts which are joint and several may be regarded as furnishing two distinct remedies; one by a joint action against all the obligors, the other by a several action against each. Freeman on Judgments, § 335. If this be correct, an action against all the obligors on the joint liability would not be a bar to an action against each one on the several liability. As was held in Moore v. Rogers [19 Ills. 347], where the contract is joint and several, its legal effect is double, equivalent to independent contracts founded upon one consideration, for performance severally and also for performance jointly; and distinct remedies upon the same instrument, treating it as a joint contract and as a several contract, may be pursued until satisfaction is fully obtained."

MAY *v.* HANSON *et al.*

6 CALIFORNIA, 642.—1856.

Action against Hanson and Fall personally, and Dewey as administrator on a joint and several bond executed by Hanson, Fall, and Dewey's intestate. Demurrer sustained.

MR. CHIEF JUSTICE MURRAY. The demurrer was properly sustained upon the second ground, because the administrator of Dewey ought not to have been joined. In actions upon joint and several contracts or obligations, an administrator cannot be joined with the survivors, because one is joined *de bonis testatoris* and the other *de bonis propiis*. Humphreys v. Yale, 5 Cal. 173.

It is said the demurrer was sustained on a different ground in the court below. It makes no difference, as this was one of the causes of demurrer assigned below.

Judgment affirmed.

9 Cyc. 657 (52); 708 (51-52).

(*ii.*) *Joint* or *several promisees.*

WILLOUGHBY *v.* WILLOUGHBY.

5 NEW HAMPSHIRE, 244.—1830.

Assumpsit. Plaintiff nonsuited. The action was on a note as follows:

"HOLLIS, June 25, 1828.

"For value received, I promise to pay Washington or Joseph Willoughby $200 on demand, with interest.

"JOHN WILLOUGHBY."

BY THE COURT. We are of opinion that the note in this case is evidence of a contract with W. and J. Willoughby, and that *or* in the note must be understood to mean *and*.

Such being the purport of the note upon the face of it, this action cannot be maintained upon it, and the nonsuit must stand. Blanckenhagen and another v. Blundell (2 B & Ald. 417) was an action on a note which was described in the declaration as payable to J. P. Damer, or the plaintiffs, and the suit was, like this, brought in the name of the plaintiffs without joining J. P. Damer. The cause was decided in favor of the defendant upon a demurrer to the declaration. But Bailey, J., intimated that an action might be maintained upon the note in the name of all the payees. Judgment on the nonsuit.[1]

9 Cyc. 659-660 (58-60); 661 (67); 5 C. L. R. 245.

[1] "One and the same contract, whether it be a simple contract or a con-

BOGGS *v.* CURTIN *et al.*

10 SERGEANT & RAWLE (PENN.), 211.—1823.

Assumpsit for money paid to the use of defendant (plaintiff in error). Judgment for plaintiffs (defendants in error).

Defendant owed the firm of Duncan & Foster, and the plaintiffs, J. & D. Mitchel, and Curtin & Boggs, gave their joint note for the amount, and afterwards paid it. Defendant settled with J. & D. Mitchell, who gave him a receipt in full.

GIBSON, J. The action of assumpsit must be joint or several, accordingly as the promise on which it is founded is joint or several.

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tract by deed, cannot be so framed as to give the promisees or covenantees the right to sue upon it both jointly and separately."—Dicey on Parties, pp. 110, 111.

"Where a covenant is in its terms expressly and positively joint, the covenantees must join in an action upon it, although as between themselves their interest is several."—Clapp v. Pawtucket Inst. for Saving, 15 R. I. 489, 494.

"When the legal interest in a covenant and in the cause of action thereon is joint, the covenant is joint, although it may, in its terms, be several or joint and several."—Capen v. Barrows, 1 Gray (Mass.), 376, 379.

"As the language of the promise is not expressly joint, but, to say the least, may be construed to be joint or several, it should, according to the authorities cited, be held several, because the interest of the promisees is several."—Emmeluth v. Home Benefit Ass'n, 122 N. Y. 130, 134.

In Keightley v. Watson and another, 3 Exch. 716, the covenant read: "The defendants, for themselves, their heirs, executors, and administrators, covenant with Keightley, his executors, administrators, and assigns; and as a separate covenant with A. A. Dobbs, his executors, &c." Of this form Rolfe B. said: "It appears to me that Mr. Preston's suggestion was perfectly well founded, that the rule in Slingsby's case [5 Co. 18 b.] was not a rule of law, but a mere rule of construction. From that case it appears that, if a covenant be *cum quolibet et qualibet eorum*, that may be either a joint or several covenant, and it will depend on the context whether it is to be taken as joint or several; but it cannot be both. The rule given in Slingsby's case is not very satisfactory to my mind, namely, with regard to the difficulty which arises as to the proper person to recover damages. If a party choose to enter into a covenant which creates such a difficulty I do not see what the court has to do with it. It is clear that parties can so contract by separate deeds; why, then, should they not be able equally to do so by separate covenants in the same deed? If they so word one covenant as to make it a joint and separate covenant, had it not been otherwise decided, I confess I should have seen nothing extraordinary in holding that if they choose so to contract as to impose upon themselves that burthen, and state it to be both joint and several, the court ought so to construe it. But Slingsby's case has laid down the opposite rule. I take it that from that time the rule has always been—whether distinctly expressed or not it is not necessary to consider—but the rule has been that you are to look and see from the context what the parties meant. Applying that rule here, I see no doubt about the question. They have said in terms that it is to be a separate covenant."

Where the promise is *express,* there can be little difficulty in determining to which class it belongs, as its nature necessarily appears on the face of the contract itself; and if it be joint, all to whom it is made must, or at least may, sue on it jointly, and after having recovered, settle among themselves the proportion of the damages to which each is respectively entitled: as in the case put in the note to Coryton v. Lithebye (2 Saund. 116 a, note 2), where there was a promise to two, in consideration of £10 to procure the re-delivery of their several cattle which had been distrained. But an *implied* promise, being altogether ideal and raised out of the *consideration* only by intendment of law, follows the nature of the consideration; and as that is joint or several, so will the promise be; as in the case of the implied promise to contribute, which arises in favor of sureties, or persons who have paid a debt for which, along with others, they were jointly liable, and on which they cannot sue jointly, but each has a separate action, for what he has paid beyond his aliquot part. Graham v. Robertson, 2 T. R. 282; Brand & Herbert v. Boulcott, 3 Bos. & P. 235.

Now, in an action for money paid, laid out, and expended, to the defendant's use, actual *payment* without regard to the *liability* under which it was made is the consideration of the assumpsit. It is because the plaintiff *has* paid, not because he was *bound* to pay, that the law implies a promise, the obligation to pay only supplying the place of a precedent request, which would otherwise be necessary. The criterion, therefore, is not whether the plaintiffs were jointly liable to pay the debt, but whether they actually paid it jointly. If one has paid the whole, it would be clear that all could not sue. But joint payment can be made only with joint funds; for each must contribute to the whole, and as payment with the money of the one cannot be payment by the other, there must necessarily be an undivided interest in the fund out of which the money comes; otherwise, there will separately be payment by each, of particular parts of the debt.

Now there was no evidence that the defendant's debt was paid with funds held in common by the respective firms of Curtin & Boggs, and of J. & D. Mitchel. The receipt of Duncan & Foster contains no assertion of the fact, nor would it be evidence against the defendant if it did. On the other hand, the receipt of J. & D. Mitchel, to the defendant, for the part which they had advanced, shows that they considered it to have been their separate property; for had it been the joint property of the two firms when it was paid out, it would hardly have been treated as the separate property of either when it was returned, as that would have had the effect of securing the one, and of casting the risk of recovering what remained due on the other. Then, under the pleadings, payment out of a com-

mon fund was a necessary part of the plaintiff's case and one which they were bound to prove; and having failed to prove it, the defendant was entitled to a direction that they had not made out a case on which they ought to recover.

The remaining point was not necessarily involved in the cause, and need not have been stirred if the court below had given the direction required. It is unnecessary, therefore, to decide it here.

Judgment reversed.

PART III.

THE INTERPRETATION OF CONTRACT.

CHAPTER I.

Rules Relating to Evidence.

Proof of document.

STORY *v.* LOVETT.

1 E. D. SMITH (N. Y. C. P.), 153.—1851.

Action for conversion. Judgment for plaintiff. Defendant appeals.

Plaintiff claimed to be the mortgagee of the property in question. The mortgage was produced and the mortgagor testified that it had been executed by him. The execution was in the presence of a subscribing witness, who was not called. Defendant objected to this testimony.

Woodruff, J. The rule that the execution of an instrument must be proved by the subscribing witness, if there be one living, competent to testify, and within the jurisdiction of the court, is inflexible. The adverse party has an undeniable right to require him who offers the instrument in evidence, to call the person who was chosen to attest the fact of the execution, that he may, by cross examination, elicit all the attending circumstances. The oath of the grantor, obligor, or mortgagor, cannot be substituted. Hollenback v. Fleming, 6 Hill, 303; Henry v. Bishop, 2 Wend. 575; 2 Greenl. Ev., § 569.

It would not be difficult to assign other reasons why the plaintiff was not entitled to recover on the case exhibited at the trial, but the above is a sufficient reason for reversing the judgment.

The judgment must be reversed.[1]

17 Cyc. 431 (6–7); 35 L. R. A. 321.

[1] Now changed by Statute in New York, see N. Y. Code Civ. Proc., § 961 b. See also Ills. Rev. St. (1908), p. 1067.

"The English rule requires that the execution of an attested writing shall be established by the testimony of the attesting witness, or, in case of his death, disability, or absence from the jurisdicton, by proof of his hand-

COLBY *v.* DEARBORN *et al.*

59 NEW HAMPSHIRE, 326.—1879.

Writ of entry.

CLARK, J. Both parties claim title to the demanded premises under Kimball C. Prescott. The plaintiff's title is derived from a levy founded on an attachment made June 24, 1873. The defendants are in possession, claiming title under a mortgage, executed by Prescott, February 14, 1873, and recorded February 20, 1873, more than four months prior to the date of the plaintiff's attachment; and therefore if the mortgage is valid, the defendants are in possession under a title prior to the plaintiff's. The plaintiff contends that the mortgage is void for uncertainty in the description of the note secured by it, the amount of the note not being stated in the condition of the mortgage. The consideration of the mortgage is $400, and the condition is the payment of a note of even date with the mortgage, payable in four months from date, with interest. The court received parol evidence showing that the note intended to be secured by the mortgage was a note for $400, bearing the same date as the mortgage, and payable in four months from date, with interest. This evidence was rightfully received. Benton v. Sumner, 57 N. H. 117; Cushman v. Luther, 53 N. H. 563; Bank v. Roberts, 38 N. H. 23; Melvin v. Fellows, 33 N. H. 401; Boody v. Davis, 20 N. H. 140. The mortgage being valid, there must be

Judgment for the defendants.

17 Cyc. 627–628 (79–83); 27 Cyc. 1058 (38, 42).

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writing. Barnes v. Trompowsky, 7 T. R. 265; Call v. Dunning, 4 East, 53; The King v. Harringworth, 4 M. & S. 350; Whyman v. Garth, 8 Exch. 803. In this country the English rule has been closely adhered to in some States, while in others it has been variously modified and restricted. Brigham v. Palmer, 3 Allen, 450; Hall v. Phelps, 2 Johns. 451. It has been held in this State that when an attestation is not necessary to the operative effect of the instrument, proof of the handwriting of a witness who cannot be produced may be dispensed with, and the paper be received in evidence upon proof of the hand of the contracting party. Sherman v. Transportation Co., 31 Vt. 162."—Munson, J., in Sanborn v. Cole, 63 Vt. 590, 593.

"It is an established rule of evidence, and often recognized, that a deed more than thirty years old may be given in evidence without proof of its execution when found in the possession of the party claiming under it, and the possession of the thing conveyed has followed the conveyance."—Stockbridge v. West Stockbridge, 14 Mass. 257; Clark v. Owens, 18 N. Y. 434.

Evidence as to fact of agreement.

REYNOLDS *v.* ROBINSON *et al.*

110 NEW YORK, 654.—1888.

Action for damages for breach of an alleged contract for the purchase by plaintiff, and sale by defendants, of a quantity of lumber. Judgment for defendants reversed at General Term. Defendants appeal.

ANDREWS, J. The finding of the referee, which is supported by evidence, to the effect that the contract for the purchase and sale of the lumber on credit, contained in the correspondence between the parties, proceeded upon a contemporaneous oral understanding that the obligation of the defendants to sell and deliver was contingent upon their obtaining satisfactory reports from the commercial agencies as to the pecuniary responsibility of the plaintiff, brings the case within an exception to the general rule that a written contract cannot be varied by parol evidence, or rather it brings the case within the rule, now quite well established, that parol evidence is admissible to show that a written paper which, in form, is a complete contract, of which there has been a manual tradition, was, nevertheless, not to become a binding contract until the performance of some condition precedent resting in parol. Pym v. Campbell, 6 El. & Bl. 370; Wallis v. Littell, 11 C. B. (N. S.) 368; Wilson v. Powers, 131 Mass. 539; Seymour v. Cowing, 4 Abb. Ct. App. Dec. 200; Benton v. Martin, 52 N. Y. 570; Juilliard v. Chaffee, 92 Id. 535, and cases cited; Taylor on Ev., § 1038; Stephen's Dig. Ev., § 927. Upon this ground, we think the evidence of the parol understanding, and also that the reports of the agencies were unsatisfactory, was properly admitted by the referee and sustained his report, and that the General Term erred in reversing his judgment. It is perhaps needless to say that such a defense is subject to suspicion, and that the rule stated should be cautiously applied to avoid mistake or imposition, and confined strictly to cases clearly within its reason.

The order of the General Term should be reversed, and the judgment on the report of the referee affirmed.

All concur. Order reversed and judgment affirmed.[1]

17 Cyc. 642 (46); W. P. 312 (3).

[1] *Accord:* Blewitt v. Boorum, 142 N. Y. 357 (sealed instrument). See for subsequent parol agreement, Brown v. Everhard, 52 Wis. 205; Homer v. Ins. Co., 67 N. Y. 478. That strangers to the contract may vary or contradict it by parol, see Kellogg v. Tompson, 142 Mass. 76.

Evidence as to the terms of the contract.

a. Supplementary and collateral terms.

WOOD *v.* MORIARTY.

15 RHODE ISLAND, 518.—1887.

[Reported herein at p. 465.] [1]

THURSTON *v.* ARNOLD.

43 IOWA, 43.—1876.

[Reported herein at p. 580.]

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b. Explanation of terms.

GANSON *et al. v.* MADIGAN.

15 WISCONSIN, 144.—1862.

Action for price of reaper. Defense, non-delivery. Judgment for defendant. Plaintiffs appeal.

Defendant ordered of plaintiffs in writing a reaper, warranted "to be capable, with one man and a good team, of cutting and raking off and laying in gavels for binding, from twelve to twenty acres of grain in a day." Defendant was allowed to testify against plaintiffs' objection that the agent said "one span of horses" such as defendant's would do the work, and another witness (Gunn) was also allowed to testify to the effect that in a sale to him the agent said two horses would do the work. The evidence went to establish that the machine plaintiffs alleged they tendered to defendant required four horses to run it.

DIXON, C. J. . . . The word "team," as used in the contract, is of doubtful signification. It may mean horses, mules, or oxen, and two, four, six, or even more of either kind of beasts. We look upon the contract and cannot say what it is. And yet we know very well that the parties had some definite purpose in using the word. The trouble is not that the word is insensible, and has no settled meaning,

[1] See also Chapin v. Dobson, 78 N. Y. 74; Naumberg v. Young, 44 N. J. L. 331; Hale v. Spaulding, 145 Mass. 482, *ante*, p. 552; Van Brunt v. Day, 81 N. Y. 251; Wood Mowing &c. Co. v. Gaertner, 55 Mich, 453; Bradshaw v. Combs, 102 Ill. 428; Sayre v. Wilson, 86 Ala. 151; Greenawalt v. Kohne, 85 Pa. St. 369. For the special rule applicable to deeds, see Green v. Batson, 71 Wis. 54.

but that it at the same time admits of several interpretations, according to the subject matter in contemplation at the time. It is an uncertainty arising from the indefinite and equivocal meaning of the word, when an interpretation is attempted without the aid of surrounding circumstances. It appears on the face of the instrument, and is in reality a patent ambiguity. The question is, can extrinsic evidence be received to explain it? We think it can. There is undoubtedly some confusion in the authorities upon this subject, especially if we look to the earlier cases; but the later decisions seem to be more uniform. As observed by Chancellor Desaussure, in Dupree v. McDonald (4 Des. 209), the great distinction of *ambiguitas latens,* in which parol evidence has been more freely received, and *ambiguitas patens,* in which it has been more cautiously received, has not been sufficient to guide the minds of the judges with unerring correctness; some of the later cases show that there is a middle ground, furnishing circumstances of extreme difficulty. Judge Story was of opinion (Peisch v. Dickson, 1 Mason, 11) that there was an intermediate class of cases, partaking of the nature both of patent and latent ambiguities, and comprising those instances where the words are equivocal, but yet admit of precise and definite application by resorting to the circumstances under which the instrument was made, in which parol testimony was admissible. As an example, he put the case of a party assigning his freight in a particular ship by contract in writing; saying that parol evidence of the circumstances attending the transaction would be admissible to ascertain whether the word "freight" referred to the goods on board of the ship, or an interest in the earnings of the ship. This distinction seems to be fully sustained by the later authorities, and we can discover no objection to it on principle. Reay v. Richardson, 2 C., M. & R. 422; Hall v. Davis, 36 N. H. 569; Emery v. Webster, 42 Maine, 204; Baldwin v. Carter, 17 Ct. 201; Drake v. Goree, 22 Ala. 409; Cowles v. Garrett, 30 Ala. 348; Waterman v. Johnson, 13 Pick. 261; Mechs.' Bank v. Bank of Columbia, 5 Wheat. 326; Jennings v. Sherwood, 8 Ct. 122; 1 Greenl. Ev., §§ 286, 287, and 288.

The general rule is well stated by the Supreme Court of New Hampshire, in Hall v. Davis, as follows:

"As all written instruments are to be interpreted according to their subject matter, and such construction given them as will carry out the intention of the parties, whenever it is legally possible to do so, consistently with the language of the instruments themselves, parol or verbal testimony may be resorted to, to ascertain the nature and qualites of the subject matter of those instruments, to explain the circumstances surrounding the parties, and to explain the instruments themselves by showing the situation of the parties in all their relations to persons and things around them. Thus if the language of the instrument is applicable to several persons, to several parcels of land, to several species of goods, to several monuments, boundaries or

lines, to several writings, or the terms be vague and general, or have divers meanings, in all these and the like cases, parol evidence is admissible of any extrinsic circumstances tending to show what person or persons, or what things, were intended by the party, or to ascertain his meaning in any other respect; and this without any infringement of the general rule, which only excludes parol evidence of other language, declaring the meaning of the parties, than that which is contained in the instrument itself."

If evidence of surrounding facts and circumstances is admitted to explain the sense in which the words were used, certainly proof of the declarations of the parties, made at the time of their understanding of them, ought not to be excluded. And so it was held in several of the cases above cited. 2 C., M. & R. 422; 42 Maine, 204; 13 Pick. 261. Such declarations, if satisfactorily established, would seem to be stronger and more conclusive evidence of the intention of the parties than proof of facts and circumstances, since they come more nearly to direct evidence than any to be obtained, whilst the other is but circumstantial. And though in general the construction of a written instrument is a matter of law for the court—the meaning to be collected from the instrument itself; yet, where the meaning is to be judged of by extrinsic evidence, the construction is usually a question for the jury. Jennings v. Sherwood, and other cases above. The circuit judge was therefore right in receiving parol evidence to ascertain the sense in which the word was used by the parties, and in submitting that question to the decision of the jury.

But he was clearly wrong in receiving evidence of the statements of the plaintiff's agent to the witness Gunn, at the time of making the contract with him. The occasions were different—the two contracts entirely disconnected, and though both concerned a machine of the same pattern and manufacture, yet what was said in the one case was not a part of the transaction in the other. It was no part of the *res gestæ*. If the agent Chase, in negotiating with Gunn, had made an admission of his representations to the plaintiff, evidence of such admission could not have been received. Mil. and Miss. R. R. Co. v. Finney, 10 Wis. 388. It would be going much too far, were we to hold that it was proper to give the jury the agent's statement to Gunn, as evidence tending to prove that a similar statement was made to the plaintiff. If it has any such tendency, it is so remote that the law cannot lay hold of and apply it.

The question then comes up, must the judgment, for this reason, be reversed? The defendant's counsel insist not—that the evidence before the jury was sufficient without this, and if it had been rejected, the verdict must have been the same. We are inclined to take the same view. The defendant's testimony was clear and positive as to the kind of team—that the agent said "one span of horses" would work the machine up to the warranty. In this he was not

contradicted, but rather corroborated by the agent, who was himself upon the stand. We would naturally expect, if the fact had been otherwise, the agent would have said so. On the other hand, he testifies very frankly that the defendant said he had but one team; that he told him one good team would work the machine. The admission of the improper evidence could not, therefore, have affected the finding of the jury upon this point; and consequently the plaintiffs were not prejudiced by it.

We can hardly believe that the argument of the plaintiff's counsel upon the construction of the warranty, that it referred to the capacity of the machine without regard to the kind of team employed, and was satisfied, if, under any circumstances, and with any number of horses, it could be made to perform as alleged, was urged with any real hope of success. Such a construction would be directly opposed to the manifest intention of the parties.

The jury, upon proper evidence, and under proper instructions, having found that the machine delivered at Milwaukee was not such as the contract called for, the judgment upon their verdict must be affirmed.

Ordered accordingly.

17 Cyc. 675 (69–71).

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c. Usages of trade.

PENNELL *v.* DELTA TRANSPORTATION CO.

94 MICHIGAN, 247.—1892.

LONG, J. This action was commenced in justice's court, and after a trial there appealed to the circuit, where, upon the trial before a jury, plaintiff had verdict and judgment for $29.78.

It appears that the plaintiff entered into a verbal contract with the defendant through defendant's agent, Capt. Field, who was in the employ of defendant as captain of a boat running on what is known as the "Inland Route," through Cheboygan county, by the terms of which the plaintiff was to clean out Crooked river from snags, logs, stumps, etc., that obstructed the channel. He was to be allowed two dollars per day, and the same for all help which he might employ. He hired two men, and entered upon the work the next day. Upon the completion of the work, plaintiff was paid the two dollars per day for himself and each man, as the contract stipulated. He then presented a bill for board of himself and men during the time employed. It is conceded that nothing was said about the board of himself and men at the time the contract was entered into, but on trial the court permitted the plaintiff to give evidence of a custom

or usage in that community to pay the board of men employed in certain kinds of business. This evidence was admitted under objection of defendant's counsel. It was shown by several witnesses for the plaintiff that a custom existed among lumbermen in that vicinity to pay the board of the men who were engaged in running logs down the streams, and cleaning out streams for the purpose of running logs. It was also shown that Capt. Field, defendant's agent, had resided in that vicinity for five years and upwards. Capt. Field was called as a witness by defendant, and asked if he knew of any such custom. The answer was objected to by plaintiff's counsel as incompetent, and it was ruled out by the court.

At the close of the testimony, counsel for defendant asked the court to instruct the jury:

"2. That, in order to bind defendant under a custom or usage, when the custom was not made known to defendant when it made the contract, the jury must find from the evidence that defendant or its agent had been engaged in a business before the contract was made in some manner connected with the business in which said custom is sought to be established, or the defendant cannot be presumed to have knowledge of said custom.

"3. That the simple fact that defendant's agent had resided in the section or vicinity where said custom is sought to be established is not sufficient in itself to warrant the jury in finding that the defendant had knowledge of said custom.

"4. That, in order to bind the defendant to pay for the board of plaintiff and his men, the jury must find from the evidence that the defendant had knowledge of the custom to charge for board when not expressed in the contract; and that, if they do not so find, then their verdict must be for defendant as to the question of board."

These requests were refused by the court, and the jury directed upon the subject as follows: "If you find from the evidence that the defendant agreed with the plaintiff to pay him for cleaning out this river at the rate of two dollars a day for all the work performed, and that there was a custom in that vicinity that persons who were working upon the river cleaning out the river in the manner that these men were working should be boarded by the person hiring them, and that such custom was general, uniform, certain, established, then, in that case, you should allow the plaintiff for his board and the board of these men whatever you find it to be reasonably worth." The court charged further: "The custom must be general, and it must be uniform. It must not vary from time to time. It must be an established custom; that is to say, a custom which would spring up at the time this contract was made, and continue from that time to the present, would not be an established custom. This must be the custom of that vicinity; it must be general, universal." Con-

tinuing, the court said: "Now, if you find that such a custom existed, and that this contract was made in relation to such custom, or that it was so well established and universal that all persons in that vicinity would be supposed to know the custom, and make their contracts in relation to it, then you will bring in a verdict for the plaintiff."

We think the court was in error in refusing to permit the defendant's agent to testify that he had no knowledge of such a custom; and that the court was also in error in refusing to give the defendant's second, third, and fourth requests to charge, as well as in the charge as given. Where the custom or usage is restricted to a certain locality, or business, though it has become general and uniform in that locality or in that particular business, and the custom is relied upon as a ground of recovery, it is settled, we think, that such custom is not conclusive on the party, so that he may not give evidence that it was unknown to him.

In Walls v. Bailey, 49 N. Y. 476, Mr. Justice Folger laid down the rule as follows: "We have seen that there are usages which have become so general and so universally received and acted upon as that they have become a part of the common law, and no one can be heard to profess ignorance of them. But it is equally true that there are usages so restricted as to locality or trade or business as that ignorance of them is a valid reason why a party may not be held to have contracted in reference to them. There are many cases of this kind collected in notes in Broom's Legal Maxims. (See p. 684 [691], notes 2, 3.) It seems, then, to come to this: Is the presumption which the jury may thus make conclusive, or may not that presumption be repelled by express negatory proof of ignorance? When the defendant proposed, by the question which was rejected, to offer evidence tending to show his ignorance of the existence of the usage, he claimed no more than to exercise the right of attempting by direct evidence to repel the presumption of his knowledge which might without that proof, or perhaps in opposition to it, be made from the facts of the case. It is for the jury, then, under proper instructions from the court, to take all the evidence in the case—that as to the existence, duration, and other characteristics of the custom or usage, and that as to the knowledge thereof of the parties,—and therefrom to determine whether there is shown a custom of such age and character as that the presumption of law will arise that the parties knew of and contracted in reference to it; or whether the usage is so local and particular as that knowledge in the party to be charged must be shown affirmatively or may be negatived. In this view, it was proper for the defendant to put and answer the question rejected."

Applying this rule to the facts in the present case, it is evident that the defendant's agent, with whom the contract was made, should

have been permitted to answer the question whether he had any knowledge of the existence of such a custom. The proofs in support of the prevalence of such custom were confined to lumbermen who were having logs driven down the streams or through the waters there, and who were compelled to clean out those waters for the purpose of driving logs. There was no testimony offered showing or tending to show that the defendant company, or Capt. Field, its agent, had ever driven logs down those streams, or that they were in any manner engaged in the lumbering business, necessitating the cleaning out of any streams for the purpose of driving logs. The only evidence of the business of the defendant company offered in the case was that it was running its boat through the inland waters in Cheboygan county, and that Capt. Field was the captain of the boat. Under these circumstances, the presumption cannot be conclusive upon the defendant that it had knowledge of this local custom or usage existing among lumbermen to pay the board of their men in running logs or cleaning out streams for the purpose of running logs. The mere fact that defendant's agent resided in that vicinity would not be sufficient to bring home to him the knowledge of this custom, or warrant the jury in finding that the defendant had knowledge of it.

In cases where evidence of usage is admissible at all, it is only on the ground that the parties who made the contract are both cognizant of the usage, and must be presumed to have made their engagements in reference to it. Van Hoesen v. Cameron, 54 Mich. 614. The decisions in this State are uniform that custom cannot change a definite contract, and that no custom is binding which is not certain, definite, uniform, and notorious. Lamb v. Henderson, 63 Mich. 305, and the cases there cited. In the above case it was said by Chief Justice Campbell: "No attempt was made to bring notice of this usage to the knowledge of plaintiff." The defendant in that case sought to set up a custom to defeat the payment of certain traveling expenses to one of his salesmen during the time he spent at the home office.

The court in the trial of the present case should not only have allowed Capt. Field to answer the question, and given the requests to charge asked, but should also have instructed the jury that the plaintiff could not recover unless they found that the parties contracted in reference to this custom; and in determining that question they should consider the testimony of defendant's agent, who made the contract. Higgins v. Moore, 34 N. Y. 425.

Judgment must be reversed, with costs, and a new trial ordered. The other Justices concurred.

12 Cyc. 1041-1044 (43-56). See also Wait's Engineering and construction contracts, ch. 21 (custom and usage), for many examples.

CHAPTER II.

Rules Relating to Construction.

General rules.

REED *v.* INSURANCE CO.

95 UNITED STATES, 23.—1877.

Appeal from a decree of the Circuit Court of the United States for the District of Maryland, affirming a decree of the District Court dismissing a libel.

Mr. Justice Bradley. This is a cause of contract, civil and maritime, commenced by a libel *in personam* by Samuel G. Reed, the appellant, against the Merchants' Mutual Insurance Company of Baltimore, the appellee, to recover $5000, the amount insured by the latter on the ship Minnehaha, belonging to the libellant. The policy was dated the fourteenth day of January, 1868, and insured said ship in the amount named, lost or not lost, at and from Honolulu, *via* Baker's Island, to a port of discharge in the United States not east of Boston, with liberty to use Hampton Roads for orders, "the risk to be suspended while vessel is at Baker's Island loading." The ship was lost at Baker's Island, where she had gone for the purpose of loading, on the third day of December, 1868. The defense was that the loss occurred whilst the risk was suspended under the clause above quoted; also laches by reason of the delay in commencing suit, being more than four years after the cause of action accrued.

This case, upon the merits, depends solely upon the construction to be given to the clause in the policy before referred to, namely, "the risk to be suspended while vessel is at Baker's Island loading"; and turns upon the point whether the clause means, while the vessel is at Baker's Island *for the purpose of loading,* or while it is at said island *actually loading.* If it means the former, the company is not liable; if the latter, it is liable.

A strictly literal construction would favor the latter meaning. But a rigid adherence to the letter often leads to erroneous results, and misinterprets the meaning of the parties. That such was not the sense in which the parties in this case used the words in question is manifest, we think, from all the circumstances of the case. Although a written agreement cannot be varied (by addition or subtraction)

by proof of the circumstances out of which it grew and which surrounded its adoption, yet such circumstances are constantly resorted to for the purpose of ascertaining the subject matter and the standpoint of the parties in relation thereto. Without some knowledge derived from such evidence, it would be impossible to comprehend the meaning of an instrument, or the effect to be given to the words of which it is composed. This preliminary knowledge is as indispensable as that of the language in which the instrument is written. A reference to the actual condition of things at the time, as they appeared to the parties themselves, is often necessary to prevent the court, in construing their language, from falling into mistakes and even absurdities. On this subject Professor Greenleaf says:

"The writing, it is true, may be read by the light of surrounding circumstances, in order more perfectly to understand the intent and meaning of the parties; but, as they have constituted the writing to be the only outward and visible expression of their meaning, no other words are to be added to it, or substituted in its stead. The duty of the courts in such cases is to ascertain, not what the parties may have secretly intended, as contradistinguished from what their words express, but what is the meaning of the words they have used."—1 Greenl. Ev., sec. 277.

Mr. Taylor uses language of similar purport. He says:

"Whatever be the nature of the document under review, the object is to discover the intention of the writer as evidenced by the words he has used; and, in order to do this, the judge must put himself in the writer's place, and then see how the terms of the instrument affect the property or subject matter. With this view, extrinsic evidence must be admissible of all the circumstances surrounding the author of the instrument."—Taylor, Ev., sec. 1082.

Again he says:

"It may, and indeed it often does, happen, that, in consequence of the surrounding circumstances being proved in evidence, the courts give to the instrument, thus relatively considered, an interpretation very different from what it would have received had it been considered in the abstract. But this is only just and proper; since the effect of the evidence is not to vary the language employed, but merely to explain the sense in which the writer understood it."—Id., sec. 1085.

See Thorington v. Smith, 8 Wall. 1, and remarks of Mr. Justice Strong in Maryland v. Railroad Company, 22 Id. 105.

The principles announced in these quotations, with the limitations and cautions with which they are accompanied, seem to us indisputable; and availing ourselves of the light of the surrounding circumstances in this case, as they appeared, or must be supposed to have appeared, to the parties at the time of making the contract, we cannot doubt that the meaning of the words which are presented for our consideration is that the risk was to be suspended while the

vessel was at Baker's Island for the purpose of loading, whether actually engaged in the process of loading or not. Taking this clause in absolute literality, the risk would only be suspended when loading was actually going on. It would revive at any time after the loading was commenced, if it had to be discontinued by stress of weather, or any other cause. It would even revive at night, when the men were not at work. This could not have been the intent of the parties. It could not have been what they meant by the words "while vessel is at Baker's Island loading." It was the place, its exposure, its unfavorable moorage, which the insurance companies had to fear, and the risk of which they desired to avoid. The whole reason of the thing and the object in view point to the intent of protecting themselves whilst the vessel was in that exposed place for the purpose referred to, not merely to protect themselves whilst loading was actually going on. Her visit to the island was only for the purpose of loading; as between the contracting parties, she had no right to be there for any other purpose; and, supposing that they intended that the risk should be suspended whilst she was there for that purpose, it would not be an unnatural form of expression to say, "the risk to be suspended while vessel is at Baker's Island loading." And we think that no violence is done to the language used, to give it the sense which all the circumstances of the case indicate that it must have had in the minds of the parties.

If we are right in this construction of the contract, there can be no uncertainty as to its effect upon the liability of the underwriters. The loss clearly accrued at a time when, by the terms of the policy, the risk was suspended. The ship sailed in ballast from Honolulu on or about the 7th of November, 1867, and arrived at Baker's Island on the afternoon of the twentieth day of November, 1867. She came to her mooring in safety, and her sails were furled, shortly after which a heavy gale and heavy surf arose. The gale and surf continued with violence until the 3d of December, 1867, when the ship parted her moorings, and was totally wrecked and lost. At no time after her arrival at Baker's Island was it possible to discharge ballast to receive cargo or to commence the progress of loading. The violence of the winds, current, and waves, and their adverse course and direction, prevented the ship from slipping her cables and getting to sea, or otherwise escaping the perils that surrounded her.

These facts are indisputable; and they show that, when the loss occurred, the vessel was at Baker's Island for the purpose of loading. That the process of loading had not actually commenced is of no consequence. The suspension of the risk commenced as soon as the vessel arrived at the island and was safely moored in her proper station for loading.

The appellee, as a further defense, set up laches in bringing suit.

The libel was not filed until more than four years had elapsed after the cause of action had accrued. The statute of limitations of Maryland requires actions of account, assumpsit, on the case, etc., to be brought within three years; and the counsel for the appellee insists that by analogy to this statute the admiralty court, having concurrent jurisdiction with the State courts in this case, should apply the same rule. We had occasion, in the case of The Key City (14 Wall. 653), to explain the principles by which courts of admiralty are governed when laches in bringing suit is urged as an exception in cases cognizable therein. In view of the construction which we have given to the contract in this case, it is not necessary to pass upon the precise question now raised by the appellee.

It is also unnecessary to examine other questions which were mooted on the argument.

Decree affirmed.[1]

9 Cyc. 588 (42); 17 Cyc. 673 (67).

Rules of law and equity as to time and penalties.

THURSTON *v.* ARNOLD.

43 IOWA, 43.—1876.

Action in equity to compel specific performance. Judgment for defendant. Plaintiff appeals.

Defendant agreed to convey his farm to plaintiff in consideration that the plaintiff would pay $1200 on or before September 2, 1872, and $300 on taking possession, and convey or cause to be conveyed to defendant certain lands in Missouri.

ROTHROCK, J. 1. We have carefully read and considered the evidence in the case. It is voluminous, and the review of it here would serve no useful purpose. We believe that the referee's findings of fact are fully sustained by the evidence. It is perhaps proper to say that the written contract by its terms did not make time as of its essence, but provided generally that the $1200 was to be paid on the second day of September, 1872. The plaintiff endeavored to show that there was a subsequent parol extension of time. The referee, as we think, properly found that there was no such extension, but that defendant insisted on a compliance at the time fixed, and that his situation with reference to other important business interests required that the payments should be promptly made. It further appears that the contract on plaintiff's part was a mere speculation; that he did not have title to the Missouri land, and did not

[1] See also Davison v. Von Lingen, 113 U. S. 40, *ante*. p. 302; Norrington v. Wright, 115 U. S. 188 *post*, p. 671; Moore v. Ins. Co., 62 N. H. 240, *post*. 598.

have any means to pay the $1200, and relied on a re-sale of defendant's farm at an advance to pay for the Missouri land, and that he did not succeed in making a re-sale by the time fixed for performance but afterwards, by taking a partner in the speculation, raised the money and procured a deed, and tendered performance on the 17th day of September, 1872; which tender the defendant refused. These are the important features of the case. There are many other facts which we do not deem it necessary to refer to.

Among the findings of the referee is the following:

"I further find from the testimony in the cause, independent of what appears on the face of the written contract between Thurston and Arnold, that the time therein fixed for payment of the consideration by Thurston to Arnold was understood and intended by the parties to be 'of the essence of the contract.' I am of opinion that, as a matter of law, evidence extrinsic to the written contract is competent to prove such intention and understanding."

Counsel for plaintiff insist that extrinsic evidence is not competent for such purpose, for the reason that it varies and modifies the terms of the written contract. The contract provides for the payment to be made on a day certain, and extrinsic evidence, consisting of the acts, statements, and the verbal negotiations of the parties, showing that the time was intended to be essential, does not contradict or vary the writing, but rather confirms it, by showing that it means just what its terms provide. 1 Greenleaf Ev., § 296; 3 Id., § 366, and cases there cited.

Time may be made the essence of the contract by the express stipulation of the parties, or it may arise by implication from the very nature of the property, or the avowed objects of the seller or purchaser. Taylor v. Longworth, 14 Pet. 172, and see also Young v. Daniels, 2 Iowa, 126.

Equity will not ordinarily regard time as of essence of the contract in a sale of real estate. At law such contracts are treated as other contracts, and in order to maintain an action the plaintiff must show performance or readiness to perform at the time fixed, unless performance be waived by the other party. Equity presumes that the time named in the contract was not intended as essential by parties. This, however, is such a presumption as may be rebutted by parol evidence.

2. An application to enforce the specific performance of a contract is always addressed to the sound discretion of the chancellor, guided and governed by the general rules and principles of equity jurisprudence. In such cases relief is not a matter of right in either party, but it is granted or withheld according to the circumstances of each case when such rules or principles will not furnish any exact measure of justice between the parties. If, in the judgment of a

court of equity, good faith and justice between the parties will be attained by enforcing the contract, the failure to perform, or of a readiness to perform, at the precise time fixed, will not prevent its enforcement. In this case, we are satisfied, equity will be better subserved by denying specific performance than by granting it; and these considerations are independent of any question as to the right of defendant to show by parol evidence that time was intended to be the essence of the contract.

The evidence satisfies us that it would be grossly inequitable to compel defendant, Arnold, to now perform, or to make compensation for inability to do so, finding, as we do, from the evidence, that on the day fixed he was ready and willing to perform, and was prevented from doing so by plaintiff's default.

Affirmed.[1]

9 Cyc. 605–606 (28–29).

[1] "It is a general principle governing the construction of contracts that stipulations, as to the time of their performance, are not necessarily of their essence unless it clearly appears in the given case from the expressed stipulations of the contract, or the nature of its subject matter, that the parties intended performance within the time fixed in the contract to be a condition precedent to its enforcement, and where the intention of the parties does not so appear, performance shortly after the time limited on the part of either party will not justify a refusal to perform by the party aggrieved; but his only remedy will be an action or counter-claim for the damages he has sustained from the breach of the stipulations. In the application of this principle to the cases as they have arisen, in the promulgation of the rules naturally deduced from it, and in the assignment of the various cases to the respective classes in which the stipulation as to the time of performance is, or is not, deemed of the essence of the contract, the controlling consideration has been, and ought to be, so to decide and classify the cases that unjust penalties may not be inflicted or unreasonable damages recovered. . . . The cases just referred to illustrate two well-settled rules of law which have been deduced from this general principle, and in accordance with which this case must be determined. They are: In contracts of merchants for the sale and delivery, or for the manufacture and sale, of marketable commodities a statement descriptive of the subject matter or some material incident, such as the time of shipment, is a condition precedent, upon the failure or non-performance of which th party aggrieved may repudiate the whole contract. Norrington v. Wright, 115 U. S. 188, 203 [*post*, p. 671]; Cleveland Rolling Mill v. Rhodes, 121 U. S. 255, 261. But in contracts for work or skill and the materials upon which it is to be bestowed, a statement fixing the time of performance of the contract is not ordinarily of its essence, and a failure to perform within the time stipulated followed by substantial performance after a short delay will not justify the aggrieved party in repudiating the entire contract, but will simply give him his action for damages for the breach of the stipulation. Tayloe v. Sandiford, 7 Wheat. 13, 17; Hambly v. Delaware, M. & V. R. Co., 21 Fed. Rep. 541, 544, 554, 557."—Sanborn, J., in Beck &c. Co. v. Colorado &c. Co., 10 U. S. App. 465.

WATSON *v.* GUGINO.

204 NEW YORK, 535.—1912.

VANN, J. . . . The covenant sued upon is as follows: "The said Carmelo Gugino further agrees to devote his whole time and attention to the said corporation business, and is to receive the weekly salary of twenty dollars." It is to be observed that no period of service was specified, and even if the stipulation as to "the weekly salary" implies a hiring by the week it would not aid the plaintiff.

The effect of a general contract of hiring, no time being specified, varies in different jurisdictions. In England it is presumed to be a hiring for a year regardless of the nature of the service, unless there is a custom relating to the subject and it appears that the contract was made with reference to the custom. (Fawcett v. Cash, 3 Nev. & Man. 177; Littey v. Elwin, 2 Ad. & El. 742; Davis v. Marshall, 4 L. T. [N. S.] 216.) In some States a stipulation as to the method of payment, such as weekly, monthly or yearly, is held to denote the period of service contracted for. (Tatterson v. Suffolk Mfg. Co., 106 Mass. 56; Franklin Mining Co. v. Harris, 24 Mich. 116; Beach v. Mullin, 34 N. J. Law, 343.) In this State the rule is settled that unless a definite period of service is specified in the contract, the hiring is at will and the master has the right to discharge and the servant to leave at any time. In Martin v. New York Life Ins. Co. (148 N. Y. 117) the defendant employed the plaintiff to take charge of its real estate department at a salary of $5,000 a year. Subsequently his salary was raised to $6,500 and finally to $10,000 a year, payable monthly. We held that the hiring was at will and that the contract could be terminated at any time by either party. Judge Bartlett, speaking for the court, adopted the language used by Mr. Wood in section 136 of his work on Master and Servant, as follows: "The rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will; and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve. . . . A contract to pay one $2,500 a year for services is not a contract for a year, but a contract to pay at the rate of $2,500 a year for services actually rendered, and is determinable at will by either party. Thus it will be seen that the fact that the compensation is measured at so much a day, month or year does not necessarily make such hiring a hiring for a day, month or year, but that in all such cases the contract may be put an end to by either party at any time,

unless the time is fixed, and a recovery had, at the rate fixed for the services actually rendered." (p. 121.)

This rule was deliberately adopted, all the judges concurring, to settle the differences of opinion which had prevailed in the lower courts. It applies to the contract before us and must control the decision of this appeal, unless the theory of the Appellate Division is correct, that the covenant, under the circumstances, means a hiring for a reasonable time. [It was held that such theory was incorrect.]

Cullen, Ch. J., Gray, Haight, Werner, Hiscock, and Collin, JJ., concur.

Order reversed, etc.

26 Cyc. 974–976 (46–52); 12 C. L. R. 562.

STREEPER *v.* WILLIAMS.

48 PENNSYLVANIA STATE, 450.—1865.

Assumpsit to recover damages for the non-performance of a contract to purchase plaintiff's hotel.

The court allowed the jury to find the actual damage, which they fixed at $50, reserving the question whether judgment should be entered for that amount or for the amount of $500 fixed as a "forfeit" in the contract. Subsequently the court entered judgment for $500, the amount fixed in the contract. Defendant appeals.

AGNEW, J. This case is very defectively stated. We find, in our paper-book, no copy of the bill of exceptions, and no statement of facts. We understand, from the argument, that it was a case of total failure on the part of the defendant, and we infer, from the verdict against the defendant, that the plaintiff must have tendered performance on his part.

Upon these facts and the terms of the agreement we must determine whether the stipulated sum is a penalty, or liquidated damages. Upon no question have courts doubted and differed more. It is unnecessary to examine the numerous authorities in detail, for they are neither uniform nor consistent. No definite rule to determine the question is furnished by them, each being determined more in direct reference to its own facts than to any general rule. In the earlier cases, the courts gave more weight to the language of the clause designating the sum as a penalty or as liquidated damages. The modern authorities attach greater importance to the meaning and intention of the parties. Yet the intention is not all-controlling, for in some cases the subject matter and surroundings of the contract will control the intention where equity absolutely demands it. A sum expressly stipulated as liquidated damages will be relieved from, if it is obviously to secure payment of another sum capable of being

compensated by interest. On the other hand, a sum denominated a penalty, or forfeiture, will be considered liquidated damages where it is fixed upon by the parties as the measure of the damages, because the nature of the case, the uncertainty of the proof, or the difficulties of reaching the damages by proof, have induced them to make the damages a subject of previous adjustment. In some cases the magnitude of the sum, and its proportion to the probable consequence of a breach, will cause it to be looked upon as minatory only. Upon the whole, the only general observation we can make is that in each case we must look at the language of the contract, the intention of the parties as gathered from all its provisions, the subject of the contract and its surroundings, the ease or difficulty of measuring the breach in damages, and the sum stipulated, and from the whole gather the view which good conscience and equity ought to take of the case. Equity lies at the foundation of relief in the case of forfeiture and penalties, and hence the difficulty of reaching any general rule to govern all cases. The research of counsel has furnished us with many authorities, but I refer to the following only as containing these general views: Chase v. Allen, 13 Gray, 42; Sainter v. Ferguson, 7 C. B. 716; Chamberlain v. Bagley, 11 N. H. 234; Gammon v. Howe, 2 Shep. 250; Mead v. Wheeler, 13 N. H. 351; Main v. King, 10 Barb. S. C. 59; Niver v. Rossman, 18 Barb. 50; Lampman v. Cochran, 19 Id. 388; Cotheal v. Talmage, 5 Seld. 551; Duffy v. Shockey, 11 Ind. 70; Jaquith v. Hudson, 5 Mich. 123.

The agreement in this case is a contract for the sale of a hotel. The plaintiff agreed to make a clear title to defendant on the first day of April following its date, which was in February, and to give immediate possession of the bar-room and fixtures. The defendant was to pay $3000 on the signing of the deed on the 1st of April, and agreed that plaintiff should retain possession of a certain part of the property four weeks. The price was to be $14,000, but no time was fixed for the payment of any part except the $3000. Then came the clause in question: "The parties to the above agreement doth severally agree to forfeit the sum of $500—say five hundred dollars, in case either party fail to comply with the terms of this agreement." The first feature striking our attention is the great disproportion between this sum and the purchase money, or even the portion to be paid on the 1st of April, when the deed was to be made. Clearly, it was not intended to enforce payment of the purchase money, or its first instalment only. Nor could it be intended to protect the defendant against a failure to make the title after payment of the first instalment. This leads obviously to the conclusion that the only intention of stipulating this sum was to protect against a total failure where the contract was abandoned. If either party failed, the other might abandon and demand the sum stipulated for this contingency.

Were the sum adequate in magnitude to compel specific performance, we might conclude it was intended as a penalty only, against which equity would relieve on a full compliance with the contract. But its manifest inadequacy, as compared with the value or the price of the property, leaves no other reasonable conclusion than that it was intended as a compensation to either party, when the other wholly abandoned the contract. In this view, the parties must have intended the sum as liquidated damages, and not as a penalty.

But this intention might not alone determine the equity, and therefore we also look at the state of the case as it probably might be in case of abandonment; for, if the damages are definite in their nature, and easily to be ascertained, it might be unconscionable to award the whole sum as damages. This leads to a consideration of the subject matter, and the terms of the contract. The property is a hotel—the plaintiff describes himself to be a hotel-keeper, and he contracts to deliver immediate possession of a part. Now, this involves the breaking up of his business, the purchase or lease of a new residence, and the disposal of furniture needed for a hotel, but probably not for a private family. Relying on the performance of the defendant, the plaintiff may make many journeys in search of a new home, encounter difficulties in suiting himself, involve himself in new purchases, raise large sums of money, and in many ways incur heavy losses and expenses, and yet he may be unable, or find it very difficult, to prove their extent. So the defendant might contract for the sale of his own property, purchase furniture and liquors, contract for loans of money to perform his contract, and incur liabilities, all causing him losses very difficult to be ascertained. Now every one knows how difficult it is to reach and estimate the real losses men suffer from disappointment in their plans, and many of the subjects of loss cannot be put in evidence. An accurate account can scarcely be stated in dollars and cents, and yet but few, if asked to name a sum for a total abandonment of such a contract, would be willing to take the risk much lower than at the sum stipulated here.

From all these circumstances, added to the intention deduced from the contract, we conclude that the parties fixed the sum stipulated, as the measure of the damages either would probably suffer from a total failure, and the compensation to be made therefor. The word "forfeit," according to many of the authorities, is therefore outweighed by the other elements of interpretation, and we must construe it as meaning "to pay."

But we are told that the jury assessed the damages at $50—one-tenth of the stipulated sum. This is true, but it does not follow they had no difficulty in doing so, or that the very difficulty of proving and making the proof was not the cause of so small a verdict. It establishes only that, as a jury must find upon the evidence, the

proof was not sufficient to enable them to give more. But it does not detract from the nature of the case, or explain away the intention gathered from the contract.

The judgment is affirmed.[1]

13 Cyc. 90 (21); 91 (23); 13 L. R. A. 671; 34 L. R. A. (N. S.) 588; 3 C. L. R. 588; 5 C. L. R. 398; Drake, Liquidated damages and estoppel by contract, 9 Mich. L. R. 588.

[1] "It is, however, the law of this State, as settled by this court, that where the language used is clear and explicit to that effect, the amount is to be deemed liquidated damages when the actual damages contemplated at the time the agreement was made 'are in their nature uncertain and unascertainable with exactness, and may be dependent upon extrinsic considerations and circumstances, and the amount is not, on the face of the contract, out of all proportion to the probable loss.'"—Curtis v. Van Bergh, 161 N. Y. 47.

For distinction between a case where the sum is liquidated damages and one where it is an alternative consideration, see Pearson v. Williams, *post*, p. 615.

PART IV.

DISCHARGE OF CONTRACT.

CHAPTER I.

Discharge of Contract by Agreement.

Waiver.

KELLETT *v.* ROBIE.

99 WISCONSIN, 303.—1898.

Winslow, J. This is an action for breach of promise of marriage, and the plaintiff has obtained a judgment for damages fixed at $3500. The contract of marriage was admitted, but the defendant claimed that there was a subsequent mutual release. This was denied by the plaintiff, and upon this issue the case was tried.

The evidence showed that the parties became engaged on August 30, 1890, the plaintiff then being twenty years of age; and it was agreed that the marriage should not take place for three years. The parties were farmers' children, and lived with their parents in adjoining towns in Winnebago County, about a mile and a half from each other. After the engagement, the defendant frequently called upon the plaintiff until December 17, 1893, at which time the defendant claims that the plaintiff suggested to him that, as long as his (defendant's) people were opposed to the match, they should separate, and call the engagement off, and that he assented to this proposition. The defendant never called on the plaintiff after this time, although they had some correspondence, which is in the record. Soon after this alleged conversation, the defendant commenced to call upon another young lady in the neighborhood, and continued to pay attention to her without objection on the part of the plaintiff, until he was married to her in December, 1895. The plaintiff denied positively that she released the defendant from the engagement. In the course of her examination as a party under section 4096, Rev. St. 1878, she admitted that they had a conversation in December, 1893, in which she says, "I told him if he did not want to marry

me, of course he could suit himself; but he said *he* was marrying me, not his people, and he came to see me just the same." The evidence showed that the defendant was worth about $6000, composed of his interest in the estates of his father and grandfather, both of which were still unsettled.

Several exceptions to rulings upon evidence and to the charge of the court were argued by the appellant, but, as we do not think we should be compelled to reverse the judgment on account of them alone, we shall not discuss them, but proceed to the main question, namely, whether the verdict is contrary to the evidence.

Upon this question, after careful consideration of all the evidence, and especially of the letters written by the plaintiff after the alleged release, we can come to no conclusion except that the verdict is clearly against the preponderance of the evidence. These letters demonstrated to a certainty that something of a serious nature had interrupted the relations of the parties about the time that the defendant alleges the release took place. No explanation as to what this serious event was is offered except the defendant's explanation of a release. We shall not give the letters in full, but content ourselves with some extracts, which seem to conclusively establish that the former relationship was broken off, and that marriage was no longer contemplated.

In a letter of January 21, 1894, she says: "Fred: If you desire a change, why take it, and end the matter right here. As I said previously, I cannot count second. I am glad of one thing: if we do separate forever, you can always think that I performed my duty by you from the very first to the last." On March 1, 1894, she wrote: "Fred: You may think it queer on my part in asking you to come and see me, after what has happened. I would never do so if it were not absolutely necessary, Fred; that you know. I know it will cause hard feelings, but I cannot help it. You must know, and the sooner the better. So let me see you as soon as possible. If I have done wrong in writing, please forgive me, Fred; it is for your and my welfare." On March 8, 1894, she wrote again: "I just want you to come just once, and risk everything to oblige me. Your trouble is as nothing compared to mine. I knew you were in town Monday. I seen your horse, and some way I felt you were there. I don't feel hard toward you one bit, Fred. You will find me just the same. I am not fickle; once is forever with me; so don't feel bad about nothing. You shall never suffer through me again. I hope the day may come when you forget that you ever knew me. . . . Now, Fred, if you don't want to come, and if you think you will be happier by staying away, why I will try and bear it."

When the plaintiff said to the defendant in her letter of January 21st, "If you desire a change, take it, and end the matter right here,"

we can see no escape from the conclusion that it was an offer of freedom from the engagement; and when it further appears that the defendant acted upon this or a similar offer, and without objection from the plaintiff, but with her knowledge, courted and married another woman, it must be considered that the offer was accepted, and that the plaintiff has become bound by the offer and its acceptance. We are unable to understand how, in the face of this evidence, the jury could have found that there was not a mutual release of the engagement.

In connection with this unaccountable verdict, we cannot refrain from saying that the damages awarded are grossly excessive, and that we should feel obliged to reverse upon this ground in any event. The defendant's estate amounted to about $6000, and there are no circumstances of aggravation in the case. The defendant is now married, and to give considerably more than half of his property as damages upon the facts appearing here, even if there had been no express release, we regard as out of the bounds of reason. The damages are so far excessive as to show passion, if not perversity, on the part of the jury.

By the Court.—Judgment reversed, and action remanded for a new trial.

9 Cyc. 593–594 (62–67); Williston, Rescission by parol agreement, 4 C. L. R. 455.

COLLYER & CO. *v.* MOULTON *et al.*

9 RHODE ISLAND, 90.—1868.

Assumpsit. Plea, the general issue.

POTTER, J. The plaintiffs made a verbal contract with the defendants, then partners, to build a machine. The work was charged as fast as done, and the materials when furnished. After a small part of the work had been done, the firm was dissolved; and the defendant Moulton, the same day, gave notice of it to the plaintiffs, and told them he could be no longer responsible for the machine. The defendant Moulton claims that the plaintiffs released him and agreed to look to the other partner for payment; but this the plaintiffs deny. The plaintiffs went on and completed the machine, and then sued Bromley alone for his claim, but discontinued the suit, and now sue both the former partners, the writ having been served on Moulton only.

Where two parties contract, one to do a particular piece of work and the other to pay for it, the latter may, at any time, countermand the completion of it, and in such case the former cannot go on and complete the work and claim the whole price, but will be entitled

only to pay for his part performance, and to be compensated for his loss on the remainder of the contract. Clark v. Marsiglia, 1 Denio, 317; Durkee v. Mott, 8 Barb. S. C. 423; Hosmer v. Wilson, 7 Michigan, 294.

In the present case, the two defendants, although the partnership was dissolved, still remain joint contractors so far as the plaintiff was concerned; and we think that either of them had a right to countermand the order before completion, and then the joint contractors would have remained liable as before stated. But the defendant Moulton claims that he was verbally released by the plaintiffs and that the plaintiffs agreed to look to the other defendant, Bromley, alone for their pay.

There is some apparent inconsistency in the language used in the reports and text writers, as to the manner in which a simple contract may be annulled. We think the rule is that so long and so far as the contract remains executory and before breach, it may be annulled by agreement of all parties; but that when it has been broken and a right of action has accrued, the debt or damages can only be released for a consideration; and even so far as it remains executory, it may be said that the agreement to annul on one side may be taken as the consideration for the agreement to annul on the other side. Dane, 5, 112; Johnson v. Reed, 9 Mass. 84; Cummings v. Arnold, 3 Met. 486–9; Richardson v. Hooper, 13 Pick. 446; Blood v. Enos, 12 Vermont, 625.

So far, therefore, as the contract in the present case remained unfinished on the 10th of February, 1865, when the notice was given and the alleged waiver was made, we may consider, either that the contract was annulled or waived by consent, in which case (the machine, so far as completed, being tendered or delivered) the plaintiff could claim only for work and materials to that date without further damages,—or that the work was countermanded by the defendant Moulton, without the assent of the plaintiffs, in which case the defendant would be liable for the part performed and for the loss on the part unperformed.

We consider the present case to fall under the first head, the notice to, and declarations and conduct of the plaintiffs amounting to a waiver of the fulfilment of the contract as first made, that is, to a release of the defendant Moulton for the part still unperformed.

But the claim for payment for the part performed stands, as we have seen, on a different ground. Was there any agreement to release Moulton from liability for this, *i. e.* the part performed; and if so, was there any agreement to take the other partner's individual promise in lieu of the promise of the firm, or anything which would amount to a consideration for the release of the firm?

If, by a mutual arrangement between the plaintiff Collyer and the

two defendants, Moulton had been released from his liability for the work already done, and a new promise made by Bromley, the other defendant, to pay for it, this would have been a valid release for a valuable consideration—one debt would have been substituted for the other. Thompson v. Percival, 5 B. & A. 925.

But we cannot find sufficient evidence of any promise on the part of the other partner, Bromley, to assume the liability; and if there was none, then the release of liability for the work already done was without consideration, as it is not claimed that there was any other consideration. We cannot find, however, any count in the declaration upon which, upon this view of the case, we can allow for anything except labor done before February 10th, the day of the giving of the notice.

Judgment for plaintiffs for amount so found due.

9 Cyc. 594 (66); W. P. 349 (69); 816 (25); 818 (36).

Substituted contract.

DREIFUS *et al. v.* COLUMBIAN EXPOSITION SALVAGE CO.

194 PENNSYLVANIA STATE, 475.—1900.

DEAN, J. This suit was begun by foreign attachment, and at the hearing the issue took the form of an action of assumpsit. The cause was sent for trial to E. Hunn Hanson, Esq., as referee, to find facts and apply to them his conclusions of law. In effect, both his findings and conclusions are in favor of plaintiffs; and defendant appeals, alleging that he erred in not finding for defendant, and certifying a balance in its favor. The findings of fact are so full, and so orderly stated by the learned referee, that it would be a useless labor to restate them at length in this opinion. Counsel for appellant accepts as true all the material facts of the referee, approved by the court below, but he assigns for error the referee's conclusions from them.

Briefly stated, defendant in February, 1895, contracted to deliver f. o. b. cars at Chicago, for shipment to Pittsburg, 3,000 tons of sheared steel, at $7.50 per ton; the deliveries to be completed by June 30th following; to be paid for in plaintiffs' 30-day drafts when delivered. At the expiration of the time neither party had performed, to the letter, the contract. Shipments continued during the summer, but defendant, alleging a breakdown of its machinery for shearing the steel, made no shipments after the 7th of August, and on the 10th of that month notified plaintiffs that it was impossible to ship sheared steel, as provided by the contract. By this time the steel had largely advanced in price over the contract figure,—had very

nearly doubled. It is not improbable, as plaintiffs allege, that defendant sought to evade its contract obligation; and it is too plain for argument that plaintiffs wanted the steel, and did not want a suit against defendant for damages. So on September 11th L. E. Block, a member of the plaintiff partnership, met Levine, president of defendant company, in Chicago. Much anger was displayed by both, and suits were threatened; but the interview ended in the making of a new contract, by which the old one was canceled, and the new one, materially modifying and changing the terms of the old, was agreed upon. The terms of the new one are expressly set out in the two letters of 12th and 13th of September, one and two days after the interview between Block and Levine. These are the letters:

"Chicago, September 12th, 1895. Messrs. Dreifus, Block & Co., Pittsburg, Pa.—Gentlemen: In accordance with agreement between the writer and your Mr. L. E. Block, the various contracts between you and this company are canceled, and you agree to accept in lieu thereof 200 tons of steel scrap, 6 feet and under, and 900 tons of steel in shape as we bring them to our shears. In all other respects, such as to price, delivery, terms of payment, and return of expense bills, etc., the same provisions shall apply as in the contracts which are canceled. Please acknowledge receipt, and oblige. The Columbian Exposition Salvage Co., per A. Levine, President."

"Pittsburg, Pa., September 13, 1895. The Columbian Exposition Co., Chicago, Ill.—Gentlemen: Replying to your favor of the 12th, same is satisfactory to us. Please have all of this material shipped without further delay. Yours, respectfully, Dreifus, Block & Co."

Shipments continued under this new contract for months, when plaintiffs seized by foreign attachment 104 tons of steel shipped by defendant to Pittsburg, and refused payment of the drafts therefor. Then this suit was commenced in Philadelphia by plaintiffs to recover damages for the breach of the old contract.

The referee finds thus: "The letters of 12th and 13th September exhibit in the clearest way that it was the express purpose of the parties to end their rights under the contract of 8th, 9th, and 12th February, and in place of them to substitute the September agreement." But on this established fact the referee concludes thus: ". . . There was no valuable consideration for the agreement. Since the plaintiffs invoke the strict legal principle, it is decided that after the breach of the February contracts there could be neither the substitution of another nor its cancellation—neither its release nor discharge—without a valuable consideration for it." Hence his finding for the plaintiffs. He states the general rule of law correctly when he says: "It is true that even after a breach of contract a debtor, by paying to his creditor but a part of his debt, may have a valid

discharge of all, if there was doubt as to the amount due, or if that which was due is unliquidated, but not otherwise. . . . In this case the debt was capable of exact ascertainment by calculation, . . . and that which was due was not unliquidated."

The opinion of a lawyer of the learning and ability of the referee has moved us to a careful revision and consideration of his report. After the most mature deliberation, we are clearly of the opinion that he erred in his application of the law to the facts found by him. Assume, as he does, that at the personal interview between Block and Levine on the 11th of September there was a distinct declaration by the latter that his company would not perform its contract; still, if anything can be clear, it is that, above all things, plaintiffs did not want a lawsuit for damages. At that stage their damages were wholly uncertain, depending on the fluctuating price of steel. They did know that they wanted the steel. What damages they might want by reason of defendant's breach, or what they might sustain, they did not know. In this dilemma, they sought for and obtained a new contract, expressly canceling the old. They did not accept a less sum than the money due on a debt certain in amount,—a contract which, under the authorities, would have been without consideration. They agreed to accept a fixed quantity and quality of merchandise, at fixed times and prices, instead of the uncertain event of a lawsuit. It in no way changes the character of the contract of 11th September, 1895, that now, long after the event, the referee can, under the terms of the old contract, to his satisfaction, with approximate certainty, liquidate the damages occasioned by the breach. How did matters stand then, with the uncertainty of the steel market on that day? That was the question in contemplation of both parties. In McNish v. Reynolds, 95 Pa. St. 483, we held "that the mutual unexecuted undertakings of an existing contract are a sufficient consideration for the cancellation of such a contract, and the substitution of a new one with different terms." It is immaterial if for a moment, during the interview, there was technically a breach by defendant. By the new agreement both treated the old one as an existing contract, and mutually agreed to rescission of it. And, even taking the most rigid statement of the rule invoked by the referee, that rule reaches no further than stated by Sharswood, C. J., in Bank v. Huston, 11 Wkly. Notes Cas. 389: "It may be considered now well settled in this State that payment of a part of an undisputed debt, after it is due, though accepted in full, is not a good accord and satisfaction. While this is so, it is equally well settled that the acceptance of a collateral thing, without regard to its value, is a good accord and satisfaction. In the absence of fraud, the courts never inquire into the adequacy of the consideration of an agreement."

Assuming that the damages could have been liquidated with cer-

tainty at that date, plaintiffs condoned all the wrong defendant threatened, and accepted as full satisfaction certain merchandise,—a collateral thing; steel of a different size, unsheared scrap,—at a different price, instead of insisting on payment in money of the sum certain. In Flegal v. Hoover, 156 Pa. St. 276, 27 Atl. 162, involving a contract which in all its material features resembles the one before us, our Brother Mitchell, speaking for the court, says: "The parties then came together, agreed upon a settlement, put its terms in writing, which was signed by both, and partly carried out. Such an agreement is not an accord, but a compromise, and is as binding as any other contract. But it was not necessary to the validity of the agreement of May, 1892, that there should have been even a compromise of disputed rights. The parties to a contract may at any time rescind it, either in whole or in part, by mutual consent, and the surrender of their mutual rights is sufficient consideration. That is what the parties did in the present case, and their rights must be determined exclusively by the agreement of May, 1892. . . . The parties have made a final adjustment of all these matters, and the original contract of 1891 is of no further efficacy, except as a guide in determining how much was due under it for the logs and bark mentioned in the agreement of 1892."

The learned referee holds that this contract must be determined by the *lex loci,* the law of Illinois; but there is no substantial conflict between the law of that State and this, as will be seen by reference to Martin v. White, 40 Ill. App. 281; Bishop v. Busse, 69 Ill. 403. And in Insurance Co. v. Detwiler, 23 Ill. App. 656, the court says: "The term 'cancellation' of a contract necessarily implies a waiver of all rights thereunder by the parties. If, after breach by one of the parties, they agreed to 'cancel' it, and make a new contract with reference to its subject matter, that is a waiver of any cause of action growing out of the original breach; and this is the rule even though the original contract was under seal." As to the attachment proceedings on the 104 tons of iron in Pittsburg, delivered on the second contract, we think, as the court there had jurisdiction before suit was entered here on the old contract for damages, it is best that that court should retain jurisdiction in that matter until final judgment. It would not be conducive to orderly litigation to import that question into this issue. But, for the reasons given, the judgment of the court below in this case is reversed, and judgment is entered for defendant.[1]

9 Cyc. 595 (71-72); W. P. 203 (15); 815 (21); 341 (42); Ames, Novation, 6 H. L. R. 184.

1 "We shall not question the rule that a contract or covenant under seal cannot be modified by a parol unexecuted contract. Coe v. Hobby, 72 N. Y. 141; Smith v. Kerr, 33 Hun, 567-571; 108 N. Y. 31. . . . The reason of

WALTER *v.* VICTOR G. BLOEDE CO.

94 MARYLAND, 80.—1901.

Action by Edward J. Walter against the Victor G. Bloede Company of Baltimore City. From a judgment in favor of defendant, plaintiff appeals.

PEARCE, J. On October 27, 1899, the appellee entered into a written contract with the appellant to purchase of him 50 tons, of 2,240 pounds each, of tapioca flour of a certain brand, to be shipped by steamer from Europe, and to be delivered at Canton, Baltimore, 10 tons monthly, from November, 1899, to March, 1900, both inclusive; payment to be made in cash, at the rate of 4¼ cents per pound upon arrival of each lot; and this action was brought by the appellant to recover damages for the alleged breach of this contract by the appellee in refusing to accept and pay for part of the flour thus purchased. About 7½ tons were delivered November 27, 1899, which the appellee accepted and paid for, but no further deliveries have been made by the appellant.

The declaration set out the contract fully, and the delivery made as above, and then averred that on December 18th it was agreed between the parties that the shipments of the remaining 42½ tons should be monthly during January, February, March, and April, 1900, instead of December, 1899, and January, February, and March, 1900, as stipulated in the written contract; and that still later, on February 2, 1900, plaintiff informed defendant that for reasons then explained, and beyond his control, there would be still further delay in the monthly shipments from Europe, and that he would not be able to make deliveries as agreed upon December 18th, and that defendant then waived the monthly deliveries as agreed upon Decem-

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the rule was founded upon public policy. It was not regarded as safe or prudent to permit the contract of parties which had been carefully reduced to writing and executed under seal to be modified or changed by the testimony of witnesses as to parol statements or agreements of parties. Hence the rule that testimony of parol agreements shall not be competent as evidence to impeach, vary, or modify written agreements or covenants under seal. But the parties may waive this rule and carry out and perform the agreements under seal as changed or modified by the parol agreement, thus executing both agreements; and where this has been done, and the parties have settled with a full knowledge of the facts and in the absence of fraud, there is no power to revoke or remedy reserved to either party. Munroe v. Perkins, 9 Pick. 298; Lattimore v. Harsen, 14 Johns. 329; McCreery v. Day, 28 N. Y. S. R. 597."—Haight, J., McKenzie v. Harrison, 120 N. Y. 260, 263, 264. See also Canal Co. v. Ray, 101 U. S. 522.

On substituted contracts, see also the cases under "Promise to perform existing contract," *ante*, p. 214. Also Heaton v. Angier, 7 N. H. 397, *ante*, p. 510.

ber 18th, and agreed to accept the same as they arrived. The defendant pleaded the general issue, and the case was tried before the court without a jury, the verdict and judgment being for the defendant. Four exceptions were taken by the plaintiff to rulings upon the testimony and one to the ruling upon the prayers, the main question in the case being whether a verbal agreement for the extension of time for the deliveries fixed by the contract is admissible in evidence.

It is settled that at common law the parties to a written agreement not under seal, before any breach has occurred, may, by a mere oral agreement, vary one or more of the terms of the contract, or wholly waive or annul it, and thus make a new contract resting partly in writing and partly in parol, and as such remaining obligatory upon the parties. Browne, St. Frauds (5th ed.), § 409; Kerr's Benj. Sales, § 240. But the question here is whether this rule is applicable in this State to contracts required to be in writing by the provisions of the statute of frauds. In England it was held by Lord Ellenborough in Cuff v. Penn, 1 Maule & S. 21, that the rule was applicable there. In that case there was a written contract for the purchase of 300 hogs of bacon, to be delivered at fixed times, and in specified quantities. After part delivery, defendant requested plaintiff not to press delivery of the residue, as sale was dull, to which plaintiff assented; and the court said this was only a parol dispensation of performance of the original contract in respect to the times of delivery, and was not affected by the statute of frauds; thus distinguishing between the *contract itself,* as being the only thing required by the statute to be in writing, and the *performance* of the contract as something distinct from the contract, and to which the statute has no application. But the authority of that case does not appear to have been ever fully accepted in England, and has long been regarded there as overruled by later cases. In Stead v. Dawber, 10 Adol. & E. 57, it was distinctly doubted by Lord Denman, who declined to follow it, though not overruling it otherwise than by the course of his reasoning. In Marshall v. Lynn, 6 Mees. & W. 109, the point to be decided, as stated in the opinion, was, where a written contract for the sale of goods within the statute stated a time for the delivery of the goods, whether an agreement to substitute another day for that purpose, if made by parol, could be binding; and it was held, in an opinion by Baron Parke, that it could not. In the course of that opinion he said: "As the case of Cuff v. Penn, which had before been very much doubted, appears to have been overruled by Stead v. Dawber, we do not think it necessary to do so;" and the rule thus laid down has been firmly established by later cases as the law in England. Browne, St. Frauds, § 411; Kerr's Benj. Sales, § 240.

In this country there is some divergence of opinion among the States, though the weight of authority seems to be decidedly with the English rule, and the Supreme Court of the United States is in full accord therewith. In Swain v. Seamans, 9 Wall. 271, 19 L. Ed. 554, it is said: "Views of the complainants are that an agreement, though in writing and under seal, may in all cases be varied as to time or manner of its performance, or may be waived altogether, by a subsequent oral agreement; but the court is of a different opinion if the agreement to be modified is within the statute of frauds. . . . Reported cases may be found where that rule is promulgated without any qualification; but the better opinion is that a written contract falling within the statute of frauds cannot be varied by any subsequent agreement of the parties, unless such new agreement is also in writing. Express decision in the case of Marshall v. Lynn is that the terms of a contract for the sale of goods falling within the operation of the statute of frauds cannot be varied or altered by parol." And to the same effect are the cases of Emerson v. Slater, 22 How. 28, 16 L. Ed. 360; Railroad Co. v. Trimble, 10 Wall. 367, 19 L. Ed. 948; Delaware v. Iron Co., 14 Wall. 579, 20 L. Ed. 779; Hawkins v. U. S., 96 U. S. 689, 24 L. Ed. 607. . . . Judgment affirmed.

9 Cyc. 599 (95-98); W. P. 823-824 (55-64); 15 H. L. R. 587; 11 C. L. R. 386.

Provisions for discharge.

MOORE *v.* PHŒNIX INS. CO.

62 NEW HAMPSHIRE, 240.—1882.

Assumpsit on a policy of insurance. Defense, discharge of policy before loss accrued. Verdict for plaintiff. Defendants appeal.

SMITH, J. The defendants are liable only in accordance with the terms and stipulations expressed in their contract as the conditions of their liability. The contract is in writing, and is contained in the policy of insurance. In consideration of $8.50 paid by the plaintiff, the defendants covenanted to insure his property against loss or damage by fire for the term of three years, commencing August 15, 1876. The policy contained this condition:

"If the above-mentioned premises shall be occupied or used so as to increase the risk, or become vacant and unoccupied for a period of more than ten days, or the risk be increased by any means whatever within the control of the assured, without the assent of this company indorsed hereon . . . then, and in every such case, this policy shall be void."

The premises remained unoccupied from August 24th until December 11, 1876, and on the 18th or 19th of that month were de-

stroyed by fire. The contract was, not that the policy should be void in case of loss or damage by fire during the period of unoccupancy, but that vacancy and unoccupancy should terminate the policy. There is no occasion to inquire what distinction there may be between a vacant and an unoccupied building (Herrman v. Merchants' Ins. Co., 81 N. Y. 184; Herrman v. Adriatic Ins. Co., 85 N. Y. 162; N. A. Fire Ins. Co. v. Zaenger, 63 Ill. 464; American Ins. Co. v. Padfield, 78 Ill. 167), for no point was made at the trial that the plaintiff's buildings were not both vacant and unoccupied from August 24 until December 11. Nor is it necessary to go into an inquiry of the reasons for exacting this condition. It is enough that the parties entered into the covenant. It was a condition that would afford protection of a substantial character against fraudulent incendiarism, of which insurers may well avail themselves. Hill v. Ins. Co., 58 N. H. 82; Sleeper v. Ins. Co., 56 N. H. 406. The insurers had a right, by the terms of the policy, to the care and supervision which are involved in the occupancy of the buildings. Ashworth v. Ins. Co., 112 Mass. 422.

There was no waiver by the defendants of the condition, nor any assent to the changed conditions of the premises insured, for they had no notice or knowledge that the buildings were unoccupied until the plaintiff furnished his proofs of loss. A waiver, to be effectual, must be intentional. The premises were left unoccupied more than ten days; and if the non-occupation had continued to the time of the fire, the plaintiff could not recover. Fabyan v. Ins. Co., 33 N. H. 206; Shepherd v. Ins. Co., 38 N. H. 240; Sleeper v. Ins. Co., 56 N. H. 406; Hill v. Ins. Co., 58 N. H. 82; Baldwin v. Ins. Co., 60 N. H. 164; Lyman v. Ins. Co., 14 Allen, 329; Merriam v. Ins. Co., 21 Pick. 162; Herrman v. Ins. Co., 85 N. Y. 162; Harrison v. Ins. Co., 9 Allen, 231; Wustum v. Ins. Co., 15 Wis. 138; Mead v. Ins. Co., 7 N. Y. 530; May Ins. (ed. 1873), § 248.

It is contended by the plaintiff, upon the authority of State v. Richmond (26 N. H. 232), that the policy had not become absolutely void at the expiration of ten days from the time the house became unoccupied, but was voidable only at the election of the defendants. In the construction of contracts words are to be understood in their ordinary and popular sense, except in those cases in which the words used have acquired by usage a peculiar sense different from the ordinary and popular one. In this case the word "void" has not acquired by usage a different signification from the ordinary and popular one of a contract that has come to have no legal or binding force. Whether the cessation of the executory contract of insurance was temporary and conditional, or perpetual and absolute, is a question; but "void" means that on the eleventh day of continuous non-occupation the plaintiff was not insured. The defendants might have

waived their condition altogether, or might have waived its breach; but having had no opportunity before the loss to make their election to waive the breach, their refusal to pay, when notified of the loss and unoccupancy, was an effectual election that they insisted upon the condition in the policy.

The duty of obtaining the consent of the defendants to the changed condition of the buildings rested with the plaintiff. By his neglect to comply with this requirement of the contract, it came to an end by force of its own terms. Girard Ins. Co. v. Hebard, 95 Pa. St. 45. If, when the unoccupancy commenced, he had requested the assent of the defendants, they would have had their option to continue the policy upon payment of such additional premium as the increased risk called for, or to cancel the policy, refunding the unearned premium. Lyman v. Ins. Co., 14 Allen, 329. There is no presumption that they would have given their assent to the unoccupancy of the buildings without the payment of a premium commensurate with the additional hazard.

The contract being once terminated, it could not be revived without the consent of both of the contracting parties. It is immaterial, then, whether the loss of the buildings is due to unoccupancy or to some other cause. Mead v. N. W. Ins. Co., 7 N. Y. 530, 535, 536; Lyman v. State M. F. Ins. Co., 14 Allen, 329, 335; Merriam v. Ins. Co., 21 Pick. 162; Jennings v. Ins. Co., 2 Denio, 81; Shepherd v. Ins. Co., 38 N. H. 232, 239, 240; Poor v. Ins. Co., 125 Mass. 274; Alexander v. Ins. Co., 66 N. Y. 464, 468; Sleeper v. Ins. Co., 56 N. H. 401; Hill v. Ins. Co., 58 N. H. 82.

[After discussing the cases cited above.] The strict and literal meaning of the stipulation that the policy shall be void if the premises remain unoccupied more than ten days is not that the insurance will be suspended merely during non-occupation after the ten days, and will revive when occupation is resumed. In ordinary speech, a void policy is one that does not and will not insure the holder if the insurer seasonably asserts its invalidity. It might be argued that this clause should be so construed as to accomplish no more than the purpose for which it was inserted; that its sole purpose was to protect the insurer against the risk resulting from non-occupation; and that if this risk was terminated by reoccupation, the parties intended the insurance should be suspended only during the existence of the cause of a risk which the company did not assume. On the other hand, it might be argued that such an intention would have been manifested by words specially and expressly providing for a suspension and resumption of the insurance, and would not have been left to be inferred from the general agreement that the policy should be void; that a final termination of the insurance at the end of ten days of non-occupation is plainly expressed by the provision that the

policy shall then be void; and that the parties would not think it necessary to go further, and provide that the void policy should not become valid on reoccupation.

Without determining the true construction, or what the result would be if there were no authority in this State, we are inclined to follow the decision in Fabyan v. Insurance Company (33 N. H. 203), although in that case the question of suspension seems not to have been presented by the plaintiff or considered by the court. It was apparently assumed that "void" meant finally extinguished, and not temporarily suspended; and in the present state of the authorities we are not prepared to hold that the assumption was erroneous.

Verdict set aside.

Blodgett and Carpenter, JJ., did not sit; Stanley, J., dissented; and the others concurred.

19 Cyc. 726 (48-49); 728 (60).

GRAY *v.* GARDNER AND OTHERS

17 MASSACHUSETTS, 188.—1821.

Assumpsit on a written promise to pay the plaintiff $5198.87, with the following condition annexed—viz., "On the condition that if a greater quantity of sperm oil should arrive in whaling vessels at Nantucket and New Bedford, on or between the first day of April and the first day of October of the present year, both inclusive, than arrived at said places, in whaling vessels, on or within the same term of time the last year, then this obligation to be void." Dated April 14th, 1819.

The consideration of the promise was a quantity of oil sold by the plaintiff to the defendants. On the same day another note unconditional had been given by the defendants, for the value of the oil estimated at 60 cents per gallon; and the note in suit was given to secure the residue of the price estimated at 85 cents, to depend on the contingency mentioned in the said condition.

At the trial before the Chief Justice the case depended upon the question whether a certain vessel, called the Lady Adams, with a cargo of oil, arrived at Nantucket on October 1st, 1819, about which fact the evidence was contradictory. The judge ruled that the burden of proving the arrival within the time was on the defendants, and further that, although the vessel might have, within the time, gotten within the space which might be called Nantucket Roads, yet it was necessary that she should have come to anchor, or have been moored, somewhere within that space before the hour of twelve following the first day of October in order to have arrived within the meaning of the contract.

The opinion of the Chief Justice on both these points was objected to by the defendants, and the questions were saved. If it was wrong on either point, a new trial was to be had, otherwise judgment was to be rendered on the verdict, which was found for the plaintiff.

PARKER, C. J. The very words of the contract show that there was a promise to pay, which was to be defeated by the happening of an event—viz., the arrival of a certain quantity of oil at the specified places in a given time. It is like a bond with a condition; if the obligor would avoid the bond, he must show performance of the condition. The defendants in this case promise to pay a certain sum of money on condition that the promise shall be void on the happening of an event. It is plain that the burden of proof is upon them, and if they fail to show that the event has happened, the promise remains good.

The other point is equally clear for the plaintiff. Oil is to arrive at a given place before 12 o'clock at night. A vessel with oil heaves in sight, but she does not come to anchor before the hour is gone. In no sense can the oil be said to have arrived. The vessel is coming until she drops anchor or is moored. She may sink or take fire, and never arrive, however near she may be to her port. It is so in contracts of insurance, and the same reason applies to a case of this sort. Both parties put themselves upon a nice point in this contract; it was a kind of wager as to the quantity of oil which should arrive at the ports mentioned before a certain period. They must be held strictly to their contract, there being no equity to interfere with the terms of it.

Judgment on the verdict.

9 Cyc. 600 (3–4).

RAY *v.* THOMPSON.

12 CUSHING (MASS.), 281.—1853.

Assumpsit for the price of a horse sold to defendant. Defense, sale on condition that defendant might return the horse, and that he had returned it. Verdict for defendant.

Plaintiff offered to prove that defendant has so abused the horse that it was materially injured and lessened in value and the plaintiff had refused in consequence to receive it back. This evidence was excluded and plaintiff excepted to the ruling.

BY THE COURT. The evidence offered by the plaintiff ought to have been admitted, to prove, if he could, that the horse had been abused and injured by the defendant, and so to show that the defendant had put it out of his power to comply with the condition, by returning the horse. The sale was on a condition subsequent; that is, on condition

he did not elect to keep the horse, to return him within the time limited. Being on a condition subsequent, the property vested presently in the vendee, defeasible only on the performance of the condition. If the defendant, in the meantime, disabled himself from performing the condition,—and if the horse was substantially injured by the defendant by such abuse, he would be so disabled,—then the sale became absolute, the obligation to pay the price became unconditional, and the plaintiff might declare as upon an *indebitatus assumpsit,* without setting out the conditional contract. Moss v. Sweet, 3 Eng. Law & Eq. 311; 16 Ad. & El. N. S. 493.

New trial ordered.

35 Cyc. 290 (19).

CHAPTER II.

Discharge of Contract by Performance.

Payment.

DILLE *v.* WHITE.

132 IOWA, 327.—1906.

The petition alleges that the defendant undertook to make a loan to plaintiff of $4,400, the repayment of which was to be secured by mortgage upon certain real estate in Ringgold county; that, in pursuance of such agreement, plaintiff did make and deliver to defendant his promissory note and mortgage for said amount, but that no part of said loan has ever in fact been received by the plaintiff, and the defendant refuses to pay or furnish the same to the plaintiff, and refuses to return the said note or to cancel and discharge the mortgage. Upon these allegations, plaintiff demands judgment against the defendant in the sum of $4,400, and interest from the date of the delivery of the note and mortgage, or that said securities be canceled and discharged. The defendant, in pursuance of such agreement, delivered to plaintiff "cashier's checks" upon the Citizens' Bank of Mt. Ayr, Iowa, to the amount of $4,400. The checks so delivered were, by the said bank, paid to plaintiff by the issuance to him, at his request, of a draft on the Stockyards Bank of St. Joseph, Mo., for an equal amount, and the checks were thereupon marked "paid and canceled." At the time of the transaction with the defendant, and at all times thereafter, the said Citizens' Bank was insolvent and had no money with which to pay said checks, nor any in the Stockyards Bank with which to meet said draft. No part of the checks or draft has been paid.

Weaver, J. . . . From the foregoing statement it is readily apparent that the one question to be determined in this controversy is whether the delivery of the so-called "cashier's checks" by the appellant, and their receipt by the appellee, are to be treated as constituting a payment to the latter of the money which the former undertook to loan him; and hence upon which party the loss occasioned by the insolvency of the bank must fall. . . .

If this were a case in which, as urged by appellant's counsel, the appellee could fairly be said to have negotiated for the purchase from appellant of checks or drafts which had been drawn by the Citizens'

Bank, it could then be conceded that, under the ordinary rule, the delivery of the instruments which were the subject of the negotiation would have served to pass the title, and, in the absence of fraud or misrepresentation by the appellant, the risk of the bank's failure before payment would have been borne by the former. But such is not the case here presented. Appellee was not purchasing or desiring to purchase commercial paper of any kind from the appellant. He was a borrower, seeking a loan of money with which to complete a land purchase. The appellant undertook to lend him the desired sum of money, not to sell him commercial paper or securities. The terms of the loan had been fully agreed upon before anything was said as to the manner or form in which the specified sum should be paid over and the checks or drafts were given and accepted not as the money itself, but as a convenient mode of obtaining the money. That such is the effect of payment by check or draft in the absence of an agreement to receive the paper in satisfaction or extinguishment of the original obligation is well settled. 3 Randolph, Com. Paper, § 15; Finney v. Edwards, 75 Va. 44; Brown v. Kewley, 2 Bos. Pl. 518; Weddigen v. Fabric Co., 100 Mass. 422; Bank v. R. R. Co., 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. Rep. 566; Born v. Bank, 123 Ind. 78, 24 N. E. 173, 7 L. R. A. 442, 18 Am. St. Rep. 312; Bickford v. Bank, 42 Ill. 238, 89 Am. Dec. 436; Good v. Singleton, 39 Minn. 340 N. W. 359. Payment by check is said in these and numerous other authorities to be conditional only, and becomes effective to discharge the obligations upon which they are delivered only when duly honored. This is also true under ordinary conditions where the party under obligation attempts to pay money by means of bills of exchange drawn by and upon third parties. See Weddigen v. Fabric Co., 100 Mass. 422; Clark v. Young, 1 Cranch (U. S.) 181, 2 L. Ed. 74; Insurance Co. v. Goble 51 Neb. 5, 70 N. W. 503.

A contrary rule has been announced in Massachusetts, Maine, and Indiana, where the giving of a check, note, or draft for a debt or obligation to pay money is held to operate as a payment or extinguishment of the obligation, but elsewhere the authorities are quite unanimous in support of the rule as we have stated it. But even in the States named it is held to be a rule of presumption only, and that the intention of the parties when expressly declared or when shown by collateral facts and circumstances will be allowed to prevail. Duncan v. Kimball, 3 Wall. (U. S.) 37, 18 L. Ed. 50. In the application of this doctrine a distinction has frequently been drawn between checks, drafts, and notes received upon a precedent indebtedness, and those received in the transaction out of which the indebtedness arises, and it is sometimes said that the delivery and acceptance of the unindorsed check, draft, or note of a third party for a debt of contempo-

raneous origin will operate as payment. In support of this proposition, no case has been more frequently cited than Whitbeck v. Van Ness, 11 Johns. (N. Y.) 409, 6 Am. Dec. 383, a decision which was clearly right upon the facts involved. In that case one Deane was indebted to Van Ness in the sum of $90, and Van Ness, desiring to purchase a horse owned by Whitbeck, offered to give him $90 for it, if the latter would accept in payment the note of Deane for that amount. This offer was accepted, and Deane, at the request of Van Ness, made his note direct to Whitbeck. The note not being paid, and the maker proving insolvent, Whitbeck sued Van Ness for the purchase price of the horse. As to the record presented, the court says: "Nothing can be more manifest than that both parties perfectly understood that the plaintiff should take Deane's note at his own hazard." With that fact established, no room was left for argument. The agreement to take the note at his own risk being made manifest, the transaction was one of exchange of one commodity for another instead of a sale in the ordinary sense of the word, and plaintiff had no more claim for recovery against Van Ness than he would have had if, instead of the note, he had accepted shares of corporation stocks in exchange for his horse, and later ascertained that the shares were less valuable than he supposed. And it may be fully conceded that in all cases where a party holding the note or other written obligation of another sells it or exchanges it for other property without indorsement, and without fraud, no presumption of liability arises against him in the event the paper proves to be worthless. But, where the note, check, or draft is not given and accepted as the thing for which the receiver has bargained, but as a convenient method by which the money it represents may be transferred from one party to the other, there is a presumption that the payment is conditional upon the paper being honored on due presentation. It is undoubtedly true that as to the presumption attending transactions of this kind and the burden of proof concerning the intention of the parties, the cases are in considerable confusion, but the exigencies of the present appeal do not require any attempt on our part to elucidate the true rule in these respects; for, wherever the burden be placed, we believe the record sufficient to support the finding of the trial court. That the intention of the parties shall prevail in determining whether the delivery and acceptance of a note, check, or draft, drawn by the debtor or by a third person are to be treated as payment in themselves, or as payment conditional upon the honoring of the paper by the drawee, is held with substantial unanimity by all the courts.

There are a few exceptional cases, principally in the State of New York, where the court has seemed to trench upon the province of the jury respecting this matter of fact (see Whitbeck v. Van Ness, *supra;* Gibson v. Tobey, 46 N. Y. 637, 7 Am. Rep. 397; Hall v. Stevens, 116

N. Y. 201, 22 N. E. 374, 5 L. R. A. 802), and dispose of the question as one of law, but the courts of that State appear, nevertheless, to be committed to the rule as above stated that the intention of the parties will control the question of payment, and that such intention may be established by proof of an express agreement or of circumstances from which an agreement or understanding may be implied. Roberts v. Fisher, 43 N. Y. 159, 3 Am. Rep. 680; Noel v. Murray, 13 N. Y. 167; Monroe v. Hoff, 5 Denio (N. Y.), 360; Porter v. Talcott, 1 Cow. (N. Y.) 383; Ontario Bank v. Lightbody, 13 Wend. (N. Y.) 101, 27 Am. Dec. 179; Johnson v. Weed, 9 Johns. (N. Y.) 310, 6 Am. Dec. 279; Vail v. Foster, 4 N. Y. 312; Roget v. Merritt, 2 Caines (N. Y.), 116. Such, also, as we have said, is the current of authority in other jurisdictions. [Citing cases from Wash., Pa., Md., Vt., Ohio, Wis., Neb., Mich., Mass., Ga., England, and U. S. Supreme Ct.] In considering the question of the intent of the parties in the instant case, we must not close our eyes to the facts attending and characterizing the transaction between the parties, or to the manner in which such transactions are usually negotiated and consummated in the business world. The vast majority of men having money to invest in any considerable sum do not carry their funds upon their person or in their desks, but keep them on deposit in some bank, and, save in exceptional cases, the delivery of money upon a loan or other investment is accomplished through the medium of checks, orders, or drafts, and not by immediate and direct transfer of the money. Of such transactions, a leading writer says that, in the absence of any agreement to the contrary, a payment by note or bill of exchange "is always presumed to be conditional." Benjamin on Sales (2d ed.), § 729. The paper is given and received upon the mutual faith and understanding of the parties that it represents actual value to its full nominal amount, and that on due presentation to the drawee it will be honored, and only upon its being thus honored does the payment become effective and absolute. This has often been held true even where the person entitled to receive the money expresses a preference for its payment by check, but does not agree to assume the risk of its being honored. Everett v. Collins, 2 Campbell, 515; Hughes v. May, 4 A. & E. 954; Cohen v. Hale, 3 Q. B. D. 371.

In Millard v. Argyle, [6 M. & G. 40], Maule, J., says: Payment is not a technical term. It has been imported into law proceedings from the exchange and not from law treatises. When you speak of paying cash, that means satisfaction; but when by bill, that does not import satisfaction unless the bill is ultimately taken up." So, also, in Stedman v. Gooch, [1 Esp. 3], it is said by Lord Kenyon that "the law is clear that if in payment of a debt the creditor is content to take a bill or note payable at a future day, he cannot legally commence action on his original claim until such bill or note becomes payable, but if such

bill or note is of no value, he may consider it as waste paper, and resort to his original demand." When a shipper was about to pay the freight upon goods being shipped by him, the agent of the carrier expressed his preference to receive it in a check, which was given him accordingly. The drawer of the check had the money in the bank to which the check was directed, but, on the following day, and before the check was presented for payment, the bank failed. No agreement being shown that the check was intended to be received as absolute payment, the carrier was held entitled to recover on the original consideration. Railroad Co. v. Collins, 1 Abb. N. C. 47, affirmed in 57 N. Y. 641. Judge Story, in his well-known treatise on Promissory Notes (section 104), says: "In general by our law, unless otherwise especially agreed, the taking of a promissory note for a pre-existing debt or a contemporaneous consideration is treated as a conditional payment only; that is, as payment only in case it is duly paid at maturity." Where A. sold goods to B. at an agreed price, and received in payment the note of C. without B.'s indorsement, a recovery by A. upon the original consideration (C. becoming insolvent before the note fell due) was upheld on appeal, the court there saying: "If it was a part of the original agreement between the parties that plaintiff should take the note in full satisfaction of the goods sold, so that he, and not the defendants, should run the risk of the note, then undoubtedly the plaintiff has no right of action. But the fact whether such was or was not the agreement was submitted to the jury, and they have decided in favor of the plaintiff. The books all agree that there must be a clear and special agreement that the vendor shall take paper absolutely as payment, or it will be no payment if it afterwards turns out to be of no value. And this rule requiring such a special agreement ought to be adhered to, for it is well calculated to prevent fraud and support justice." Johnson v. Weed, 9 Johns. (N. Y.) 310, 6 Am. Dec. 279. If this language were to be construed as requiring in all cases proof of an express agreement by the recipient of the bill or note to receive it as absolute payment, it is probable that it states the rule too rigidly, for, as we have already shown, the generally accepted doctrine gives effect to the implied, as well as the express, agreement or understanding of the parties. We think, however, that the passage we have quoted was not intended as requiring the establishment of an express agreement in all cases to sustain a claim of payment by the acceptance of commercial paper, but rather as emphasizing the proposition that the mere fact of such delivery and acceptance upon a money demand in the ordinary course of business gives rise to no presumption of absolute payment. It is true that, in Whitbeck v. Van Ness, *supra,* the court indulges in some criticism of the language used in Johnson v. Weed, but concedes that it was correctly decided. The same language was thereafter quoted approvingly

in Bank v. Lightbody, 13 Wend. (N. Y.) 112, 27 Am. Dec. 179, and by Sutherland, J., in Porter v. Talcott, 1 Cow. (N. Y.) 384. It may also be said of the opinion in the Whitbeck case that, under the conceded or assumed state of facts then before the court, the criticism of Johnson v. Weed is clearly obiter.

In Hoeflinger v. Wells, 47 Wis. 631, 3 N. W. 589, the distinction sought to be made concerning the burden of proof between cases where the bill or note is transferred upon an existing indebtedness and cases where the indebtedness is contracted at the time, is said to be "Not supported by the weight of authority."

In Gardner v. Gorham, 1 Doug. (Mich.) 507, the plaintiff sold to the defendants a quantity of goods, and, as part of the same transaction, defendants transferred to plaintiffs certain notes executed by third parties. Defendants made some representations as to the value of these securities, but expressly refused to indorse or guaranty their payment. The notes proving worthless, plaintiffs brought action to recover the price of the goods sold. Reversing a judgment for the defendants the court expressly waives any consideration of the question of fraud or false representation, and says that the question whether the notes were received as payment was one of fact on which the plaintiff was entitled to go to the jury. It is there said: "It is believed that no principle of law is better established at the present day than that the giving of a promissory note for goods sold, or for any other valuable consideration, is not payment unless it is agreed to be so taken, and, in this respect, it makes no difference whether the note be given for a precedent debt or for a debt contemporaneously with the agreement." To same effect, see Crawford v. Berry, 6 Gill & J. 72. In this case, the Maryland court says: "If the appellee sold the oxen to the appellant, and received the single bill of Magruder on that account without an agreement to receive it as payment for the oxen, and to run the risk of its being paid or not, it was not an extinguishment of the debt due for the oxen which continued liable to be enforced if the assigned bill, without laches on part of the appellee, should not be paid." The same court, in Insurance Co. v. Smith, 6 Har. & J. 166, 14 Am. Dec. 268, says: "Where a party, at the time of contracting a debt, assigns the note of a third person to the vendor, such note does not extinguish the original cause of action unless it was received as payment or satisfaction of the original contract." Responding to a call of his creditor, requesting remittance of amount due by draft, a debtor purchased and forwarded a draft for the proper amount, but the bank issuing the paper failed before it was presented for payment, and the loss was held to fall upon the debtor who purchased it. Insurance Co. v. Goble 51 Neb. 5, 70 N. W. 503. This decision goes farther perhaps than we might be disposed to follow under similar circumstances. "Nothing is better settled

than that a check is not payment but is only so when the cash is received on it. There is no presumption that a creditor takes a check in payment arising from the mere fact that he accepts it from his debtor." Bank v. Railroad Co., 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. Rep. 566. Whether the delivery of cashier's checks like those involved in this suit was intended and accepted as absolute payment has been held to be a question of fact for the jury. Briggs v. Holmes, 118 Pa. 283, 12 Atl. 355, 4 Am. St. Rep. 597. Even in Massachusetts, where the giving of a bill or note is *prima facie* payment of the original obligation, it has been held that, where goods were sold under an agreement, the seller would receive his payment by drafts drawn by him on a third person, and the drafts were in fact so drawn and accepted by the drawee, but the latter became insolvent before these obligations were taken up, the seller could abandon the drafts, and recover of the purchaser as for goods sold and delivered. It was further held that a surrender of the drafts to the drawer was not essential to a maintenance of the action if tender be made on the trial. Alcock v. Hopkins, 60 Mass. 484. See, also, Zerrano v. Wilson, 62 Mass. 424. The same rule has been applied in Georgia, in Johnson v. Bank, 25 Ga. 643, and Weaver v. Nixon, 69 Ga. 699.

In Weddigen v. Fabric Co., 100 Mass. 422, we have another case where, as part of the original contract of sale, the seller was to receive bills of exchange drawn by one third party upon another. Goods were sold, drafts drawn and accepted, as agreed, and receipt in full issued, but, upon failure of the drawee, the seller was permitted to recover the price of the goods from the purchaser. To same effect is Sebastian v. Codd, 77 Md. 293, 26 Atl. 316. And see Vail v. Foster, 4 N. Y. 312; Times Co. v. Benedict, 37 Ill. App. 250; Bradway v. Groenendyke, 153 Ind. 508, 55 N. E. 434; Benj. on Sales (2d ed.), § 729; Loeschigh v. Blum, 1 Daly (N. Y.), 49; Bill v. Porter, 9 Conn. 23; Davidson v. Bridgeport, 8 Conn. 473; Heartt v. Rhodes, 66 Ill. 351.

In Huse v. McDaniel, 33 Iowa, 406, the plaintiff sold land and took in part payment therefor certificates of deposit. These certificates of deposit were not negotiable, and were not indorsed or guaranteed by the defendant, and in that respect were not unlike the instruments now under consideration. The certificates not being paid on presentment plaintiff brought suit and obtained judgment thereon against prior indorsers (Huse v. Hamblin, 29 Iowa, 501, 4 Am. Rep. 244), and the judgment proving uncollectible, he brought action against the purchaser upon the original contract of sale, and this court held him entitled to recover. In an earlier case (Gower v. Halloway, 13 Iowa, 154) we stated our view as follows: "The general rule is that the giving of a bill of exchange or a promissory note for goods sold, or

for an existing contract, is not to be regarded as payment of the indebtedness unless there is an express agreement to that effect."

But even if we should go to the extreme of some of the precedents relied upon by the appellant, and hold that the appellee in the instant case is required to assume the burden of showing the payment by cashier's checks was conditional rather than absolute (a proposition which we do not decide), we must still hold that the requirement has been met. In addition to the circumstances already alluded to, which in themselves tend to show that the parties did not contemplate a mere sale and delivery of cashier's checks or drafts, the appellee, as a witness, expressly negatives such intent, and the appellant, though a witness in his own behalf, does not testify otherwise. It is the settled rule of this court that the intent with which the note or check is received is a fact to which the parties may testify. Kruse v. Lumber Co., 108 Iowa, 355, 79 N. W. 118; Browne v. Hicker, 68 Iowa, 330, 27 N. W. 276; Frost v. Rosecrans, 66 Iowa, 405, 23 N. W. 895. Taking the facts as admitted, or as they have been disclosed without dispute in the testimony, it is inconceivable that when the papers had been exchanged appellant supposed he had simply sold two cashier's checks, representing the nominal amount of $4,400, the payment of which was at the appellee's risk. Assuming as we do that appellant was acting in entire good faith, he believed that he had the money in the bank, and that the paper would be promptly honored on presentation. He made a loan of that money, and not simply an assignment of his claim against the bank. Had he said to the appellee: "Here are two cashier's checks, which I expect you to take as money, and if dishonored on presentation you must bear the loss," it is not in the least probable that they would have been accepted. Appellee was in the need of money, and was borrowing it for immediate use. He was not in a situation to deal with uncertainties or to engage in any speculation upon the possible insolvency of the bank, and he took the checks as countless thousands of people in the world of business are taking them every day, not as money, and not as absolute payment, but as an assurance that, upon making due demand at the place of deposit, payment would then and there be consummated. . . .

[Deemer, J., and McClain, C. J., dissented, the latter saying in the course of his opinion: "I desire to draw attention more specifically to one question which seems to me to be controlling in the disposition of this case. The vital question is whether plaintiff accepted the cashier's checks, and voluntarily converted them for his own purposes, and not in pursuance of any agreement or arrangement with defendant, express or implied, into a different form of obligation on the part of the bank. If he did this, he plainly cannot recover."][1]

30 Cyc. 1199 (38–42); 35 L. R. A. (N. S.) 1.

[1] In Hall v. Stevens, *et al.*, 116 N. Y. 201, cattle were sold by plaintiff to

Tender.

KNIGHT *v.* ABBOTT.

30 VERMONT, 577.—1858.

Book account. Defense, tender. Judgment for defendant. Plaintiff appeals.

BENNETT, J. We think no valid tender was made. It seems all that was done was that the defendant remarked to the plaintiff, as the latter was passing by him, "I want to tender you this money before Mr. Dodge (at the same time holding in his hands thirty-five dollars and fifty cents), for labor you have done for me," but the plaintiff kept along with his team, making no reply. The defendant

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defendants and plaintiff accepted from defendants a draft for $1311.25 drawn by the First National Bank of Buffalo upon the Fourth National Bank of New York. The Buffalo bank was insolvent, unknown to plaintiff or defendants. The drawee refused to pay the draft. The court said: "The plaintiff having proved the sale and delivery of the cattle and the acceptance by him of a draft growing out of the transaction itself, but neither signed nor indorsed by the defendants, who was required to show whether the draft was taken as payment or as security? The answer to this question depends upon whether the draft was taken for a present or a precedent debt. If it was the former, the presumption is that it was agreed to be taken in payment, and the burden of proving the contrary rested upon the plaintiff; while if it was for the latter, the presumption is that it was not taken as payment, and the *onus* of establishing that it was so taken rested upon the defendants. (Noel v. Murray, 13 N. Y. 167; Whitbeck v. Van Ness, 11 Johns. 409.)"

Place of payment.—In Weyand v. Park Terrace Co., 202 N. Y. 231, the court after a review of English and American authorities, says: "The rules relating to the place where payments should be made upon contract have been established by long usage and can be briefly stated as follows:

1. It is a general rule that a debtor must seek his creditor to make payment of his indebtedness.

2. The parties to a contract may provide therein where payments thereon shall be made.

3. Where a contract is made outside of the State in which the promisor resides, and it does not, either by express terms or by fair inference, provide where the same is to be performed, it will be presumed that the parties intend that it shall be performed at the place where it is made, and the promisor must provide at such place to make the payments thereon.

4. Where a contract is made in this State either with a person then a resident of this State, who afterwards removes therefrom, or with a nonresident of this State, it is the duty of the promisee to provide a place in this State where payments can be made, and it is not necessary for the debtor to go beyond the bounds of this State to make payments thereon.

Where a person promises to pay specified amounts from time to time pursuant to a written contract, if he or the payee desire that the same be paid at a particular place, it is just as easy to specify in the instrument the place where, as the time when, such payments are to be made."

named no sum which he wished to tender, nor the amount he held in his hands, although it appeared subsequently that he had thirty-five dollars and fifty cents in his hands. It was for the defendant to make out affirmatively that he made a legal tender. The plaintiff was under no obligation to stop his team to make inquiries, or to have a sum of money tendered him; and unless the defendant specified the amount which he wished to tender, the plaintiff could not determine as to the sufficiency of the sum, and no refusal by the plaintiff to receive any specific sum of money could be predicated upon such an offer as the case shows was made. All that the case legally shows, is an intention on the part of the defendant, or rather a willingness, to make a tender. If no tender was made at the time suggested, there is no occasion to inquire about its being kept good.

The judgment of the County Court is reversed, and judgment for the plaintiff, for the sum reported by the auditors, and interest.

38 Cyc. 138 (35-36).

VANN, J., IN MANN *v.* SPROUT.

185 NEW YORK, 109.—1906.

When a debt is due, a tender of the entire amount with no condition attached, and the payment thereof into court pursuant to its order, even if not accepted, is an absolute transfer of the money to the creditor. When the sum tendered is less than the amount due, it is a conclusive admission of the indebtedness to the extent of the tender, regardless of the final result of the action, and not only does the party paying it into court lose all right to it, but the court itself has no power to make an order in the same action, which, in effect, retransfers the title. Relief from mutual mistake, or mistake on one side and fraud on the other, can be had, if at all, only in an independent action brought for the purpose. Even if the verdict is for a less amount, or for nothing at all, the title has irrevocably passed, and the result of the action has no effect thereon. The same rule prevails whether the action is in tort or on contract, for in either case the money paid into court by the defendant pursuant to a tender belongs to the plaintiff in any event. Refusal of the creditor to accept, or the death of either party, or the commencement of another action, does not change the effect, for the title passes by operation of law the same as if the tender had been accepted. The transfer is complete and cannot be changed without consent, or a decree in equity, from the moment the court takes control of the money. Acceptance by the court for the plaintiff has the same effect as acceptance by the plaintiff himself. Deposit in a bank, or with a third party, without the order of the court, does not prevent a withdrawal if there has been

no acceptance, but the action of the court in a suit pending before it, whereby at the request of one party it takes money into its possession for the benefit of the other, has the same effect as actual acceptance, and *ipso facto* vests the title in him. The custody of the law is the custody of the plaintiff, and the action of the defendant operates as a final and irrevocable transfer. If the plaintiff goes on with the action and is nonsuited, or the verdict is against him or is for a sum less than the amount tendered and paid into court, still the defendant cannot take the money back, for it is not his, but has passed irrevocably to his adversary. If thereafter the fund is lost or stolen by the county treasurer, the loss falls on the plaintiff, not on the defendant, who has no further interest in the money. Taylor v. Brooklyn El. R. Co., 119 N. Y. 561, 23 N. E. 1106; Wilson v. Doran, 39 Hun, 88; Id., 110 N. Y. 101, 17 N. E. 688; Becker v. Boon, 61 N. Y. 317; Beil v. Supreme Council Am. L. of H., 42 App. Div. 168, 58 N. Y. Supp. 1049; Murray v. Bethune, 1 Wend. 191; Slack v. Brown, 13 Wend. 390; Dakin v. Dunning, 7 Hill, 30, 42 Am. Dec. 33; Bank of Columbia v. Southerland, 3 Cow. 336; Malcolm v. Fullarton, 2 Durn. & E. 645, 648; 2 Parsons on Cont. (9th ed.) 789; 2 Whart. on Cont., § 976; 1 Beach on Cont., § 331.

38 Cyc. 176 (86–87); 177 (92).

Alternative performance.

PLOWMAN & McLANE *v.* RIDDLE

7 ALABAMA, 775.—1845.

Assumpsit by the defendant against the plaintiffs in error. The plaintiff declared on a promissory note for $300.

ORMOND, J. The last plea sets up as defence to the action a condition of the contract that the sum of money for which it was made "may be discharged in good leather; one third in sole leather at 30 cents per pound, one third in harness or skirting leather, at 37½ cents per pound, and the residue in upper leather priced in the same proportion," and averred a readiness and willingness to deliver the leather at the maturity of the note. . . .

The defendant appears to have considered this contract, as in legal effect, a promise to deliver leather of the kinds specified to the value of $300, at a particular time, but that is clearly not the contract of the parties, which is to pay $300 at a particular time with a condition superadded, giving them the privilege of discharging it in leather at a specified price. This is clearly for their benefit, and it was their duty, if they elected to deliver the leather in discharge of their contract, to give notice to the plaintiff of their readiness and

willingness to do so. Having omitted to do so, their contract to pay the money has become absolute, and they cannot, when sued for the money, defeat the action by proving the existence of a fact which was peculiarly within their own knowledge.

The injustice of this defence will be apparent when it is considered that the defendants were under no obligation to deliver the leather, and if it had risen in price, doubtless would not have delivered it, but would have paid the money; being then a condition inserted for their benefit, it was necessary that they should have given notice of their election to pay in leather. McRae v. Raser, 9 Porter, 122; Stewart v. Donnelly, 4 Yerger, 177; Church v. Feteran, 2 Penn. 301; Erwin v. Cook, 2 Dev. 183. From this examination it appears that the plea was bad, in not averring notice of an election to discharge the obligation in leather. . . .[1]

9 Cyc. 647–648 (84–90); 14 H. L. R. 613.

PEARSON *v.* WILLIAMS' ADMINISTRATORS.

24 WENDELL (N. Y.), 244.—1840.

The administrators of Williams sued Pearson in the court below. The trial judge decided that the $4000, stated in the contract, was liquidated damages; to which opinion the defendant excepted and judgment having passed against him for that sum he now brings error. The material facts are stated in the opinion.

BRONSON, J. The defendant, in consideration that the intestate sold him fourteen lots of land for the sum of twenty-one thousand dollars *only,* covenanted to do two things—*first,* to remove from the lots the surplus earth and stone above the corporation level, within a reasonable time; and *second,* to erect two brick houses upon the lots by a specified day; or, in default of erecting such houses, to pay the intestate four thousand dollars, when afterwards demanded. So far as this action is concerned, we may lay the first branch of the covenant, which relates to the surplus earth and stone entirely out of view. It is a distinct stipulation, which cannot affect the remaining branch of the covenant.

The case then comes to this: The defendant, for a specified consideration, agreed that he would erect two brick houses on the lots by a certain day, or in default of so doing, would afterwards pay the intestate four thousand dollars on demand. This was an optional agree-

[1] "I take it that the rule is very clear, that when one contracts in the alternative to do one of two things by a given day, he has, until the day is past, the right to elect which of them he will perform; but if he suffer the day to elapse without performing either, his contract is broken, and his right of election is lost."—Choice v. Moseley, 1 Bailey (S. C.) 136.

ment. The defendant has the choice of erecting the houses by the day; or of omitting to do so, and then paying the specified sum of money. He made his election by omitting to build within the time. The obligation to pay four thousand dollars thereupon became absolute, and the plaintiffs were, I think, entitled to recover that sum, with interest from the time of the demand.

This does not belong to the class of cases in which the question of liquidated damages has usually arisen. It will be found in most, if not all, of those cases that there was an absolute agreement to do, or not to do, a particular act, followed by a stipulation in relation to the amount of damages in case of a breach; and in declaring upon the contract, the breach has been well assigned by alleging that the party did, or omitted to do, the particular act. But here, there is no absolute engagement to build the houses. It was optional with the defendant whether he would build them or not; and there would have been no sufficient breach, if the plaintiffs had stopped with alleging that the houses were not built. This is not a covenant to build, with a liquidation of the damages in case of non-performance; but it is a covenant to build within a specified time, or afterwards to pay a sum of money. The money is not to be paid by way of damages for not building the houses; but is to be paid, if the houses are not built, as part of the contract price for the lots conveyed by the intestate.

Again: This is not simply an alternative covenant, to build, or to pay a sum of money, within a specified period. If it were so, the question of damages would perhaps be open. But it is an agreement to build by a certain day, or *afterwards* pay a sum of money. When the day for building had gone by, it was then merely a covenant to pay money. It was necessary, in declaring, to allege that the houses were not built—not, however, because that part of the contract was any longer in force—but by way of showing that the event had happened which the defendant agreed to pay the money. It had now become a simple covenant to pay money; and like other cases where there is an agreement to pay a gross sum of money, that sum, with interest from the time it became payable, forms the measure of damages.

Let us reverse the order of these stipulations, and suppose that the defendant had agreed to pay the intestate four thousand dollars by a particular day, or in default of so doing that he would afterwards build the houses. The defendant might then have discharged himself by the payment of the money by the day; or he might at his election, suffer the day to pass, and then build the houses. If he did neither, the intestate would have an action; but the question of damages would turn wholly upon the agreement to build. The enquiry would be, either how much it was worth to build, or how much has the intestate lost by the neglect. The day for paying the four thousand dollars having gone by, that clause of the covenant could

have no possible influence upon the question of damages. The recovery might be either more or less than that sum. In short, the intestate would recover damages for not building, whatever those damages might appear to be. So here taking the stipulations in the order in which they stand in the contract, the question of damages turns wholly upon the agreement to pay the four thousand dollars in a certain event. The event having happened, the plaintiffs are entitled to that sum, without any reference to the fact that the defendant might at one time have discharged himself by building the houses.

We have no right to call this sum of four thousand dollars a penalty, or say that it was inserted in the contract for the purpose of ensuring the erection of the houses. There is nothing in the covenant which will warrant such an inference. We are to read the covenant as the parties have made it; and then it appears that this sum of four thousand dollars was not inserted for the benefit of the intestate, but as a privilege to the defendant. The intestate had no option, but the defendant had. He was at liberty to discharge himself from the covenant by building the houses, if he deemed that course most for his interest or convenience; or he might elect, as he has done, to omit building and pay the money. So far as we can judge from his acts, he deems that course most beneficial to himself.

Whether the plaintiffs, or the persons whom they represent will be better off if they get the money, than they would have been had the houses been put up, must, from the nature of the case, be a difficult question to decide; and that is one reason why the parties should be left to settle the matter for themselves, as they have done by the contract. But if we could see clearly, that the building of the houses would have been of little importance to the plaintiffs, that could not alter the case. Astley v. Weldon, 2 Bos. & Pul. 346; Daikin v. Williams, 12 Wendell, 447.

Although I have said something on that subject, we are not, I think, at liberty to speculate upon the probable consequence of holding parties to their agreement. So long as they keep within the boundaries of the law, and practice no fraud, our business is to see that their contracts are enforced. We have no dispensing power.

Judgment affirmed.

Substantial performance.

NOLAN *et al. v.* WHITNEY.

88 NEW YORK, 648.—1882.

In July, 1877, Michael Nolan, the plaintiffs' testator, entered into an agreement with the defendant to do the mason work in the erection

of two buildings in the city of Brooklyn for the sum of $11,700, to be paid to him by her in instalments as the work progressed. The last instalment of $2700 was to be paid thirty days after completion and acceptance of the work. The work was to be performed to the satisfaction and under the direction of M. J. Morrill, architect, to be testified by his certificate, and that was to be obtained before any payment could be required to be made. As the work progressed, all the instalments were paid except the last, and Nolan, claiming that he had fully performed his agreement, commenced this action to recover that instalment. The defendant defended the action upon the ground that Nolan had not fully performed his agreement according to its terms and requirements, and also upon the ground that he had not obtained the architect's certificate, as required by the agreement.

Upon the trial the defendant gave evidence tending to show that much of the work was imperfectly done, and that the agreement had not been fully kept and performed on the part of Nolan; the latter gave evidence tending to show that the work was properly done, that he had fairly and substantially performed his agreement, and that the architect had refused to give him the certificate, which, by the terms of his agreement, would entitle him to the final payment. The referee found that Nolan completed the mason work required by the agreement according to its terms; that he in good faith intended to comply with, and did substantially comply with, and perform the requirements of his agreement; but that there were trivial defects in the plastering for which a deduction of $200 should be made from the last instalment, and he ordered judgment in favor of Nolan for the last instalment, less $200.

EARL, J. It is a general rule of law that a party must perform his contract before he can claim the consideration due him upon performance; but the performance need not in all cases be literal and exact. It is sufficient if the party bound to perform, acting in good faith, and intending and attempting to perform his contract, does so substantially, and then he may recover for his work, notwithstanding slight or trivial defects in performance, for which compensation may be made by an allowance to the other party. Whether a contract has been substantially performed is a question of fact depending upon all the circumstances of the case to be determined by the trial court. Smith v. Brady, 17 N. Y. 189; Thomas v. Fleury, 26 Id. 26; Glacius v. Black, 50 Id. 145; Johnson v. De Peyster, 50 Id. 666; Phillip v. Gallant, 62 Id. 256; Bowery Nat. Bank v. The Mayor, 63 Id. 336. According to the authorities cited, under an allegation of substantial performance, upon the facts found by the referee, Nolan was entitled to recover unless he is barred because he failed to get the architect's certificate, which the referee found was unreasonably and improperly refused. But when he had substantially performed his contract, the

architect was bound to give him the certificate, and his refusal to give it was unreasonable, and it is held that an unreasonable refusal on the part of an architect in such a case to give the certificate dispenses with its necessity. All concur.

Judgment affirmed.[1]

9 Cyc. 602 (12–14).

GILLESPIE TOOL CO. *v.* WILSON *et.al.*

123 PENNSYLVANIA STATE, 19.—1888.

Assumpsit on a contract for drilling a well. Defense, non-performance. Nonsuit. Plaintiff appeals.

Plaintiff agreed to drill for defendants a gas-well 2000 feet deep and five and five-eighths inches in diameter. In case salt water was struck, the well was to be eight inches in diameter in order to shut off the salt water. A well was dug to the depth of between 1500 and 1600 feet, when, owing to an accident, it had to be abandoned. Another well was then begun, and when at a depth of 800 feet plaintiff was notified that defendants held the contract was for the first well and would not be responsible for the second. Plaintiff continued and drilled the second well to a depth of 2204 feet, but struck salt water at a depth of 1729 feet, and to case this off reduced the hole to admit of casing four and one-quarter inch size. Plaintiff claimed a substantial performance on the ground that the well was for testing the territory, and that for this purpose a four and one-quarter inch hole was as good as a five and five-eighths inch, and that it would have been a useless expense to ream it out to the latter diameter when the experiment proved that the territory did not produce gas.

Mr. Justice Sterrett. Plaintiff company neither proved nor offered to prove such facts as would have warranted the jury in finding substantial performance of the contract embodied in the written proposition submitted to and accepted by the defendants. In several particulars the work contracted for was not done according to the plain terms of the contract. Nearly one-half of the well was not reamed out, as required, to an eight-inch diameter so as to admit five and five-eighths inch casing in the clear. About 180 feet of the lower section of the well also was bored four or four and one-quarter inches instead of five and five-eighths inches in diameter. In neither of these

[1] In Crouch v. Gutmann, 134 N. Y. 45, Follett, C. J., *dissenting*, says: "The tendency, called equitable, of courts to relieve persons from the performance of engagements deliberately entered into, and in legal effect to make for litigants new contracts which they never entered into, and which it cannot be supposed they ever would have entered into, has been and is being carried to a length which cannot be justified in reason."

particulars, nor in any other respect, was there any serious difficulty in the way of completing the work in strict accordance with the terms of the agreement. To have done so would have involved nothing more than additional time and increased expense. The fact was patent, as well as proved by undisputed evidence, that a four and one-quarter inch well would not discharge as much gas as one five and five-eighths inches in diameter. It is no answer to say that for the purpose of testing the territory a four and one-quarter inch well was as good as a five and five-eighths inch well; nor that reaming out the well to the width and depth required by the contract would have subjected defendants to additional expense without any corresponding benefit. That was their own affair. They contracted for the boring of a well of specified depth, dimensions, etc., and they had a right to insist on at least a substantial performance of the contract according to its terms. That was not done, and the court was clearly right in refusing to submit the case to the jury on evidence that would not have warranted them in finding substantial performance of the contract.

The equitable doctrine of substantial performance is intended for the protection and relief of those who have faithfully and honestly endeavored to perform their contracts in all material and substantial particulars, so that their right to compensation may not be forfeited by reason of mere technical, inadvertent, or unimportant omissions or defects. It is incumbent on him who invokes its protection to present a case in which there has been no wilful omission or departure from the terms of his contract. If he fails to do so, the question of substantial performance should not be submitted to the jury.

The offers specified in the third, fourth, and fifth assignments were rightly rejected. The proposed evidence was irrelevant and incompetent. There is nothing in the record that requires a reversal of the judgment.

Judgment affirmed.[1]

9 Cyc. 603 (16–18); 24 L. R. A. 327.

[1] "To justify a recovery upon the contract as substantially performed, the omissions or deviations must be the result of mistake or inadvertence, and not intentional, much less fraudulent; and they must be slight or susceptible of remedy, so that an allowance out of the contract price will give the other party substantially what he contracted for. They must not be substantial and running through the whole work, so as to be remediless, and defeat the object of having the work done in a particular manner. And these are questions of fact for the jury or trial court. Olmstead v. Beale, 19 Pick. 528; Woodward v. Fuller, 80 N. Y. 312. It may seem a harsh doctrine to hold that a man who has built a house shall have no pay for it, but the other party can well say: 'I never made any such agreement. I agreed to pay you if you would build my house in a certain manner, which you have not done.' The fault is with the one who voluntarily violates his contract."—Mitchell, J., in Elliott v. Caldwell, 43 Minn. 357, 360.

Performance to satisfaction.

BROWN *v.* FOSTER.

113 MASSACHUSETTS, 136.—1873.

Contract to recover the price of a suit of clothes.

The court instructed the jury as follows:

"The plaintiff was bound to make the clothes of the material ordered, in a workmanlike manner, and to deliver them at the time agreed upon by the parties. If the plaintiff agreed to make the clothes to the satisfaction of the defendant, he was bound to do so, with these qualifications: if, when the clothes were delivered, there were defects in the fit of them, such as are liable to occur in first-class tailoring establishments, but such as could be easily remedied, and a custom among tailors has been proved to remedy such defects when they occur, the plaintiff was entitled to a reasonable opportunity therefor, and if he was willing and offered to remedy said defects, and the defendant refused to allow him to do so, the plaintiff is entitled to recover if the other facts in the case are proved."

The jury returned a verdict for the plaintiff, and the defendant excepted.

DEVENS, J. There was evidence at the trial to show that the contract between the parties was an express contract, and by the terms of it the plaintiff agreed to make and deliver to the defendant upon a day certain a suit of clothes, which were to be made to the satisfaction of the defendant. The clothes were made and delivered upon the day specified, but were not to the satisfaction of the defendant, who declined to accept, and promptly returned the same. If the plaintiff saw fit to do work upon articles for the defendant and to furnish materials therefor, contracting that the articles when manufactured should be satisfactory to the defendant, he can recover only upon the contract as it was made; and even if the articles furnished by him were such that the other party ought to have been satisfied with them, it was yet in the power of the other to reject them as unsatisfactory. It is not for any one else to decide whether a refusal to accept is or is not reasonable, when the contract permits the defendant to decide himself whether the articles furnished are to his satisfaction. Although the compensation of the plaintiff for valuable service

Accord: Van Clief v. Van Vechten, 130 N. Y. 571, where the court says: "While slight and insignificant imperfections or deviations may be overlooked on the principle of *de minimis non curat lex*, the contract in other respects must be performed according to its terms. When the refusal to proceed is wilful, the difference between substantial and literal performance is bounded by the line of *de minimis*." As to mercantile contracts, see Norrington v. Wright, 115 U. S. 188, *post*, p. 671.

and materials may thus be dependent upon the caprice of another who unreasonably refuses to accept the articles manufactured, yet he cannot be relieved from the contract into which he has voluntarily entered. McCarren v. McNulty, 7 Gray, 139.

When an express contract like that shown in the present case was proved to have been made between parties, it was not competent to control it by evidence of a usage. It may be that the very object of the express contract was to avoid the effect of such usage, and no evidence of usage can be admitted to contradict the terms of a contract, or control its legal interpretation and effect. Dickinson v. Gay, 7 Allen, 29, 31. The evidence admitted was of this description.

Exception sustained.

9 Cyc. 619–620 (6–21); W. P. 51 (59).

GWYNN *v.* HITCHNER *et al.*

O'MALLEY *v.* SAME.

67 NEW JERSEY LAW, 654.—1902.

These two cases were tried together. The plaintiffs were color-mixers, each under contract to the defendant firm, to work in the defendants' wall paper factory until July 1, 1900. The contracts provided that each was to perform his work, in the one contract, "to the satisfaction of the said firm" and in the other contract, "satisfactory to said firm." Each workman was dismissed by his employers before the expiration of the term of service specified in his contract; John H. Gwynn on April 1, 1900, and Thomas J. O'Malley on April 9, 1900. Each workman thereupon brought suit for breach of contract. The declarations, which are substantially identical, count on the contracts, and allege an unlawful discharge before the expiration of the term of service. The defendants have pleaded the general issue, and rely, in justification of the discharge, solely on dissatisfaction with the work done by the plaintiffs.

ADAMS, J. . . . In order to legalize the discharge of either workman before the expiration of his term of service, two elements must have been present in the situation: First, the employers must have been dissatisfied with his work; and, secondly, the dissatisfaction must have been the cause of discharge. Either plaintiff, therefore, would exhibit a good cause of action against the defendants if it should appear, as a result of the proof in the cause, that there was a contract of employment, that the plaintiff was discharged before the expiration of his term of service, and either that the defendants were not dissatisfied with his work, or that, however this may have been, they did not discharge him because of dissatisfaction. There were

thus, in each case, two leading questions to which, among others, proof at the trial on both sides might properly be addressed, namely, whether the defendants were dissatisfied, and whether, if they were dissatisfied, they discharged the plaintiff for that reason.

It may be objected that, from the nature of things, it was for the defendants alone to say whether they were dissatisfied, and that their testimony on this point would be conclusive. Here it is necessary to distinguish again. It is true that such averment as, "I believe," "I doubt," "I am certain," "I am satisfied," relates to a matter as to which no primary evidence can be given except by him of whose experience it is a part. But, as men are always acting and talking, their acts and words continually afford material from which rational inferences may be drawn as to the mental state and attitude of the actor and speaker. Proof of such acts and words is therefore admissible as tending either to prove or to disprove the existence of a specified condition of mind, motive, reason, or purpose.

It appears from the bill of exceptions that the testimony and proofs at the trial were directed, on both sides, to the critical points. The defendants testified that the plaintiffs did not do satisfactory work, and were for that cause discharged. On behalf of the plaintiffs there was evidence tending to show that the defendants had declared themselves to be satisfied with the work of each plaintiff; that they discharged Gwynn because they had hired another man, and could not afford the expense of three color-mixers; and that they discharged O'Malley because, as they understood, they had received notice, both from him and from a committee of the Association of Printers and Color-Mixers, that O'Malley would leave unless Gwynn was reinstated. This conflict of proof raised disputed questions of fact for the jury to decide. The direction of the verdict for the defendants was therefore legal error.

The judgments are reversed and a *venire de novo* is awarded in each case.[1]

9 Cyc. 619–620 (6–21); W. P. 51 (59); 15 H. L. R. 153.

[1] In McClure v. Briggs, 58 Vt. 82, defendant agreed with plaintiff to take a Prescott organ, with the understanding that the trade should be thrown up if defendant was not satisfied with the instrument. The court held: "It is to be noted that defendant did not take the organ to see whether it answered the contract or not, for if he had, and it did, he is bound to keep and pay for it whether satisfied or not; but he took it to see whether it was satisfactory *to him* or not. Neither he nor any of his family were competent to judge as to the quality of the organ, and so he called in an expert to test it, and he told him the tone of it was good, and better than that of the Estey organ, which he seemed to like; but notwithstanding the opinion of the expert, he was so under the spell of the Estey organ vender that he still *thought* he was dissatisfied with the tone of the organ; and if he really *thought* so he *was* so, for as a man 'thinketh in his heart, so is he.' But it is said that he was *bound* to be satisfied, as he had no ground to be

DUPLEX SAFETY BOILER CO. *v.* GARDEN *et al.*

101 NEW YORK, 387.—1886.

Appeal from a judgment of the Supreme Court at General Term in the second department, affirming a judgment for plaintiff, and from an order denying defendants' motion for a new trial.

DANFORTH, J. The plaintiff sued to recover $700, the agreed price, as it alleged, for materials furnished and work done for the defendants at their request. The defense set up was that the work was done under a written contract for the alteration of certain boilers, and to be paid for only when the defendants "were satisfied that the boilers as changed were a success." Upon the trial it appeared that the agreement between the parties was contained in letters, by the first of which the defendants said to plaintiff:

"You may alter our boilers, changing all the old sections for your new pattern; changing our fire front, raising both boilers enough to give ample fire space; you doing all disconnecting and connecting; also all necessary mason work and turning boilers over to us ready to steam up. Work to be done by tenth of May next. For above changes we are to pay you $700, as soon as we are satisfied that the boilers as changed are a success, and will not leak under a pressure of one hundred pounds of steam."

The plaintiff answered, "accepting the proposition," and as the evidence tended to show, and as the jury found, completed the required work in all particulars by the 10th of May, 1881, at which time the defendants began and thereafter continued the use of the boilers.

The contention on the part of the appellants is that the plaintiff was entitled to no compensation, unless the defendants "were satisfied that the boilers as repaired were a success, and that this question was for the defendants alone to determine," thus making their obligation depend upon the mental condition of the defendants, which they alone could disclose. Performance must of course accord with the terms of the contract, but if the defendants are at liberty to determine for themselves when they are satisfied, there would be no obligation, and consequently no agreement which could be enforced. It cannot be presumed that the plaintiff entered upon its work with this understanding, nor that the defendants supposed they were to be the sole judge in their own cause. On the contrary, not only does the law

dissatisfied. He was bound to act honestly, and to give the instrument a fair trial, and such as the seller had a right, in the circumstances, to expect he would give it, and therein to exercise such judgment and capacity as he had, for by the contract *he* was the one to be satisfied, and not another for him. If he did this and was still dissatisfied, and that dissatisfaction was real and not feigned, honest and not pretended, it is enough, and plaintiffs have not fulfilled their contract; and all these elements are gatherable from the report."

presume that for services rendered, remuneration shall be paid, but here the parties have so agreed. The amount and manner of compensation are fixed; time of payment is alone uncertain. The boilers were changed. Were they, as changed, satisfactory to the defendants? In Folliard v. Wallace (2 Johns. 395) W. covenanted that in case the title to a lot of land conveyed to him by F. should prove good and sufficient in law against all other claims, he would pay to F. $150, three months after he should be "well satisfied" that the title was undisputed. Upon suit brought the defendant set up that he was "not satisfied," and the plea was held bad, the court saying, "a simple allegation of dissatisfaction, without some good reason assigned for it, might be a mere pretext and cannot be regarded." This decision was followed in City of Brooklyn v. Brooklyn City R. R. Co. (47 N. Y. 475) and Miesell v. Globe Mut. L. Ins. Co. (76 Id. 115).

In the case before us the work required was specified, and was completed; the defendants made it available and continued to use the boilers without objection or complaint. If there was full performance on the plaintiff's part, nothing more could be required, and the time for payment had arrived; for according to the doctrine of the above cases, "that which the law will say a contracting party ought in reason to be satisfied with, that the law will say he is satisfied with."

Another rule has prevailed, where the object of a contract was to gratify taste, serve personal convenience, or satisfy individual preference. In either of these cases the person for whom the article is made, or the work done, may properly determine for himself—if the other party so agree—whether it shall be accepted. Such instances are cited by the appellants. One who makes a suit of clothes (Brown v. Foster, 113 Mass. 136), or undertakes to fill a particular place as agent (Tyler v. Ames, 6 Lans. 280), mold a bust (Zaleski v. Clark, 44 Conn. 218), or paint a portrait (Gibson v. Cranage, 39 Mich. 49; Hoffman v. Gallaher, 6 Daly, 42), may not unreasonably be expected to be bound by the opinion of his employer, honestly entertained. A different case is before us, and in regard to it no error has been shown.

The judgment appealed from should be affirmed. All concur.

Judgment affirmed.[1]

9 Cyc. 620–624 (22–44); W. P. 51 (59); 20 H. L. R. 572; 20 H. L. R. 558; 5 C. L. R. 56.

[1] In Hawkins v. Graham, 149 Mass. 284, the court said: "The only question in this case is whether the written agreement between the parties left the right of the plaintiff to recover the price of the work and materials furnished by him dependent upon the actual satisfaction of the defendant. Such agreements usually are construed not as making the defendant's declaration of dissatisfaction conclusive, in which case it would be difficult to say that they amounted to contracts (Hunt v. Livermore, 5 Pick. 395, 397), but as requiring an honest expression. In view of modern modes of business, it is

not surprising that in some cases eager sellers or selling agents should be found taking that degree of risk with unwilling purchasers, especially where taste is involved. Brown v. Foster, 113 Mass. 136; Gibson v. Cranage, 39 Mich. 49; Wood Reaping & Mowing Machine Co. v. Smith, 50 Mich. 565; Zaleski v. Clark, 44 Conn. 218; McClure Bros. v. Briggs, 58 Vt. 82; Exhaust Ventilator Co. v. Chicago, Milwaukee & St. Paul Railway, 66 Wis. 218; Seeley v. Welles, 120 Penn. St. 69; Singerly v. Thayer, 108 Penn. St. 291; Andrews v. Belfield, 2 C. B. (N. S.) 779. Still when the consideration furnished is of such a nature that its value will be lost to the plaintiff, either wholly or in great part, unless paid for, a just hesitation must be felt, and clear language required, before deciding that payment is left to the will, or even to the idiosyncrasies, of the interested party. In doubtful cases courts have been inclined to construe agreements of this class as agreements to do the thing in such a way as reasonably ought to satisfy the defendant. Sloan v. Hayden, 110 Mass. 141, 143; Braunstein v. Accidental Death Ins. Co., 1 B. & S. 782, 799; Dallman v. King, 4 Bing. N. C. 105."

In A. Wood Co. v. Smith, 50 Mich. 565, the court said: "The cases where the parties provide that the promisor is to be satisfied, or to that effect, are of two classes; and whether the particular case at any time falls within the one or the other must depend on the special circumstances, and the question must be one of construction. In the one class the right of decision is completely reserved to the promisor, and without being liable to disclose reasons or account for his course, and a right to inquire into the grounds of his action and overhaul his determination, is absolutely excluded from the promisee and from all tribunals. It is sufficient for the result that he willed it. The law regards the parties as competent to contract in that manner, and if the facts are sufficient to show that they did so, their stipulation is the law of the case. The promisee is excluded from setting up any claim for remuneration, and is likewise debarred from questioning the grounds of decision on the part of the promisor, or the fitness or propriety of the decision itself. The cases of this class are generally such as involve the feelings, taste, or sensibility of the promisor, and not those gross considerations of operative fitness or mechanical utility which are capable of being seen and appreciated by others. But this is not always so. It sometimes happens that the right is fully reserved where it is the chief ground, if not the only one, that the party is determined to preserve an unqualified option, and is not willing to leave his freedom of choice exposed to any contention or subject to any contingency. He is resolved to permit no right in any one else to judge for him or to pass on the wisdom or unwisdom, the justice or injustice of his action. Such is his will. He will not enter into any bargain except upon the condition of reserving the power to do what others might regard as unreasonable. The following cases sufficiently illustrate the instances of the first class: Gibson v. Cranage, 39 Mich. 49; Taylor v. Brewer, 1 M. & S. 290; McCarren v. McNulty, 7 Gray, 139; Brown v. Foster, 113 Mass. 136; Zaleski v. Clark, 44 Conn. 218; Rossiter v. Cooper, 23 Vt. 522; Hart v. Hart, 22 Barb. 606; Tyler v. Ames, 6 Lans. 280. In the other class the promisor is supposed to undertake that he will act reasonably and fairly, and found his determination on grounds which are just and sensible, and from thence springs a necessary implication that his decision in point of correctness and the adequacy of the grounds of it are open considerations and subject to the judgment of judicial triers. Among the cases applicable to this class are Daggett v. Johnson, 49 Vt. 345, and Hartford Sorghum Mfg. Co. v. Brush, 43 Vt. 528."

CHAPTER III.

Discharge of Contract by Breach.[1]

Forms of discharge by breach.

(*i.*) *Discharge by renunciation before performance due: anticipatory breach.*

ROEHM *v.* HORST.

178 UNITED STATES, 1.—1900.

Action for breach of four contracts, judgment for plaintiffs (84 Fed. Rep. 565); affirmed by Circuit Court of Appeals (91 Fed. Rep. 345).

In 1893 plaintiffs entered into these four contracts with defendant, by the terms of the first of which plaintiffs agreed to sell and defendant to buy 100 bales of hops of the crop of 1896, at 22 cents a pound, to be shipped in specified months at the rate of 20 bales a month; by the second, 100 bales of the crop of 1896, to be shipped in other specified months; by the third, 100 bales of the crop of 1897, to be shipped in specified months; by the fourth, 100 bales of the crop of 1897, to be shipped in other specified months. (Six other contracts of like tenor had already been performed; the total of the ten contracts was 1000 bales.)

In October, 1896, the first shipment of 20 bales was duly made under the first contract, but defendant declined to receive the hops, and notified plaintiffs that he would not receive any more under the four contracts. In January, 1897, plaintiffs began this action for damages.

At the time of defendant's refusal, plaintiffs could have made subcontracts for forward delivery of the 1896 hops at 9 cents a pound and for the 1897 crop at 11 cents a pound, and judgment was given for the difference between these prices and the contract price of 22 cents a pound, together with interest on the same from October 24, 1896.

Mr. Chief Justice Fuller delivered the opinion of the court:

It is conceded that the contracts set out in the finding of facts were four of ten simultaneous contracts, for 100 bales each, covering the furnishing of 1000 bales of hops during a period of five years,

[1] See Williston, Repudiation of contracts, 14 H. L. R. 317, 421.

of which 600 bales had been delivered and paid for. If the transaction could be treated as amounting to a single contract for 1000 bales, the breach alleged would have occurred while the contract was in course of performance; but plaintiffs' declaration or statement of demand averred the execution of the four contracts, "two for the purchase and sale of Pacific coast hops of the crop of 1896, and two for the purchase and sale of Pacific coast hops of the crop of 1897," set them out *in extenso,* and claimed recovery for breach thereof, and in this view of the case, while as to the first of the four contracts, the time to commence performance had arrived, and the October shipment had been tendered and refused, the breach as to the other three contracts was the refusal to perform before the time for performance had arrived.

The first contract falls within the rule that a contract may be broken by the renunciation of liability under it in the course of performance, and suit may be immediately instituted. But the other three contracts involve the question whether, where the contract is renounced before the performance is due, and the renunciation goes to the whole contract, and is absolute and unequivocal, the injured party may treat the breach as complete and bring his action at once. Defendant repudiated all liability for hops of the crop of 1896 and of the crop of 1897, and notified plaintiffs that he should make (according to a letter of his attorney in the record that he had made) arrangements to purchase his stock of other parties, whereupon plaintiffs brought suit. The question is therefore presented, in respect of the three contracts, whether plaintiffs were entitled to sue at once or were obliged to wait until the time came for the first month's delivery under each of them.

It is not disputed that if one party to a contract has destroyed the subject-matter, or disabled himself so as to make performance impossible, his conduct is equivalent to a breach of the contract, although the time for performance has not arrived; and also that if a contract provides for a series of acts, and actual default is made in the performance of one of them, accompanied by a refusal to perform the rest, the other party need not perform, but may treat the refusal as a breach of the entire contract, and recover accordingly.

And the doctrine that there may be an anticipatory breach of an executory contract by an absolute refusal to perform it has become the settled law of England as applied to contracts for services, for marriage, and for the manufacture or sale of goods. The cases are extensively commented on in the notes to Cutter v. Powell, 2 Smith, Lead. Cas. 1212, 1220, 9th edition by Richard Henn Collins and Arbuthnot. Some of these, though quite familiar, may well be referred to.

In Hochster v. De la Tour (2 El. & Bl. 678), plaintiff, in April,

1852, had agreed to serve defendant, and defendant had undertaken to employ plaintiff, as courier, for three months from June 1st, on certain terms. On the 11th of May, defendant wrote plaintiff that he had changed his mind, and declined to avail himself of plaintiff's services. Thereupon, and on May 22d, plaintiff brought an action at law for breach of contract in that defendant, before the said 1st of June, though plaintiff was always ready and willing to perform, refused to engage plaintiff or perform his promise, and then wrongfully exonerated plaintiff from the performance of the agreement, to his damage. And it was ruled that as there could be a breach of contract before the time fixed for performance, a positive and absolute refusal to carry out the contract prior to the date of actual default amounted to such a breach.

In the course of the argument, Mr. Justice Crompton observed:

"When a party announces his intention not to fulfill the contract, the other side may take him at his word and rescind the contract. That word 'rescind' implies that both parties have agreed that the contract shall be at an end, as if it had never been. But I am inclined to think that the party may also say: 'Since you have announced that you will not go on with the contract, I will consent that it shall be at an end from this time; but I will hold you liable for the damage I have sustained; and I will proceed to make that damage as little as possible by making the best use I can of my liberty.'"

In delivering the opinion of the court (Campbell, Ch. J., Coleridge, Earle, and Crompton, JJ.), Lord Campbell, after pointing out that at common law there were numerous cases in which an anticipatory act, such as an act rendering the contract impossible of performance, or disabling the party from performing it, would constitute a breach giving an immediate right of action, laid it down that a positive and unqualified refusal by one party to carry out the contract should be treated as belonging to the same category as such anticipatory acts, and said (p. 690):

"But it is surely much more rational, and more for the benefit of both parties, that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it. Thus, instead of remaining idle and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract. It seems strange that the defendant, after renouncing the contract and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind. If the plaintiff is barred of any remedy by entering into an engagement inconsistent with starting as a courier with the defendant on the 1st of June, he is prejudiced by putting faith in the defendant's assertion; and it would be more consonant with principle if the defendant were precluded from say-

ing that he had not broken the contract when he declared that he entirely renounced it. Suppose that the defendant, at the time of his renunciation, had embarked on a voyage for Australia, so as to render it physically impossible for him to employ the plaintiff as a courier on the continent of Europe in the months of June, July, and August, 1852; according to decided cases, the action might have been brought before the 1st of June; but the renunciation may have been founded on other facts, to be given in evidence, which would equally have rendered the defendant's performance of the contract impossible. The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time comes when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party and cannot be prejudicial to the wrongdoer. An argument against the action before the 1st of June is urged from the difficulty of calculating the damages; but this argument is equally strong against an action before the 1st of September, when the three months would expire. In either case, the jury in assessing the damages would be justified in looking to all that had happened, or was likely to happen, to increase or mitigate the loss of the plaintiff down to the day of trial. We do not find any decision contrary to the view we are taking of this case."

In Frost v. Knight (L. R. 7 Exch. 111), defendant had promised to marry plaintiff so soon as his (defendant's) father should die. While his father was yet alive he absolutely refused to marry plaintiff, and it was held in the Exchequer Chamber, overruling the decision of the Court of Exchequer (L. R. 5 Exch. 322), that for this breach an action was well brought during the father's lifetime. Cockburn, Ch. J., said:

"The law with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention not to perform it, as established by the cases of Hochster v. De la Tour, 2 El & Bl. 678, and the Danube & B. S. Railway & K. Harbour Co. v. Xenos, 13 C. B. N. S. 825, on the one hand, and Avery v. Bowden, 5 El. & Bl. 714; Reid v. Hoskins, 6 El. & Bl. 953; and Barrick v. Buba, 2 C. B. N. S. 563, on the other, may be thus stated. The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of nonperformance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party, not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the nonperformance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

The case of Danube & B. S. Railway & K. Harbour Co. v. Xenos (11 C. B. N. S. 152) is stated in the headnotes thus: On the 9th of July, A, by his agent, agreed to receive certain goods of B on board his ship to be carried to a foreign port,—the shipment to commence on the 1st of August. On the 21st of July A wrote to B, stating that he did not hold himself responsible for the contract, the agent having no authority to make it; and on the 23d he wrote again offering a substituted contract, but still repudiating the original contract. B, by his attorneys, gave A notice that he should hold him bound by the original contract, and that, if he persisted in refusing to perform it, he (B) should forthwith proceed to make other arrangements for forwarding the goods to their destination, and look to him for any loss. On the 1st of August, A again wrote to B, stating that he was then prepared to receive the goods on board his ship, making no allusion to the original contract. B had, however, in the meantime entered into a negotiation with one S for the conveyance of the goods by another ship, which negotiation ended in a contract for that purpose with S on the 2d of August. B thereupon sued A for refusing to receive the goods pursuant to his contract; and A brought a cross action against B for refusing to ship. Upon a special case stating these facts: Held, that it was competent to B to treat A's renunciation as a breach of the contract; and that the fact of such renunciation afforded a good answer to the cross action of A, and sustained B's plea that before breach A discharged him from the performance of the agreement.

Earle, Ch. J., said (p. 175):

"In Cort v. Ambergate, N. & B. & E. Junction R. Co. (17 Q. B. 127), it was held that upon the company giving notice to Mr. Cort that they would not receive any more of his chairs, he might abstain from manufacturing them and sue the company for the breach of contract without tendering the goods for their acceptance. So, in Hochster v. De la Tour (El. & Bl. 678), it was held that the courier whose services were engaged for a period to commence from a future day, being told before that day that they would not be accepted, was at liberty to treat that as a complete breach, and to hire himself to another party. And the boundary is equally well ascertained on the other side. Thus, in Avery v. Bowden (5 El. & Bl. 714, 6 El. & Bl. 953), where the agent of the charterer intimated to the captain that, in consequence of the breaking out of the war, he would be unable to furnish him with a cargo, and wished the captain to sail away, and the latter did not do so, it was held not to fall within the principle already adverted to, and not to amount to a breach or renunciation of the contract. But where there is an explicit declaration by the one party of his intention not to perform the contract on his part, which is accepted by the other as a breach of the contract, that beyond all doubt affords a cause of action."

The case was heard on error in the Exchequer Chamber before Cockburn, Ch. J., Pollock, C. B., Wightman, J., Crompton, J., Channell,

B., and Wilde, B.; and the judgment of the Common Pleas was unanimously affirmed. 13 C. B. N. S. 825.

In Johnstone v. Milling (L. R. 16 Q. B. Div. 467) Lord Esher, Master of the Rolls, puts the principle thus:

"When one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not, of course, amount to a rescission of the contract, because one party to a contract cannot by himself rescind it, but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation."

Lord Justice Bowen said (p. 472):

"We have, therefore, to consider upon what principles and under what circumstances it must be held that a promisee, who finds himself confronted with a declaration of intention by the promisor not to carry out the contract when the time for performance arrives, may treat the contract as broken, and sue for the breach thereof. It would seem on principle that the declaration of such intention by the promisor is not in itself and unless acted on by the promisee a breach of the contract; and that it only becomes a breach when it is converted by force of what follows it into a wrongful renunciation of the contract. Its real operation appears to be to give the promisee the right of electing either to treat the declaration as *brutum fulmen*, and, holding fast to the contract, to wait till the time for its performance has arrived, or to act upon it and treat it as a final assertion by the promisor that he is no longer bound by the contract, and a wrongful renunciation of the contractual relation into which he has entered. But such declaration only becomes a wrongful act if the promisee elects to treat it as such. If he does so elect, it becomes a breach of contract, and he can recover upon it as such."

The doctrine which thus obtains in England has been almost universally accepted by the courts of this country, althought the precise point has not been ruled by this court.

[The court then discusses Smoot's case, 15 Wall. 36; Lovell v. Ins. Co., 111 U. S. 264; Dingley v. Oler, 117 U. S. 490; Cleveland Rolling Mill v. Rhodes, 121 U. S. 255; Anvil Min. Co. v. Humble, 153 U. S. 540; Pierce v. Tennessee Co., 173 U. S. 1; Hancock v. New York L. Ins. Co., 11 Fed. Cas. 402; Grau v. McVicker, 8 Biss. 13; and also cites other Federal cases.]

The great weight of authority in the State courts is to the same effect as will appear by reference to the cases cited in the margin.[1]

[1] Fox v. Kitton, 19 Ill. 518; Kadish v. Young, 108 Ill. 170, 43 Am. Rep. 548; John A. Roebling's Sons' Co. v. Lock-Stitch Fence Co., 130 Ill. 660, 22 N. E. 518; Lake Shore and M. S. R. Co. v. Richards, 152 Ill. 59, 30 L. R. A.

On the other hand, in Greenway v. Gaither (Taney, 227, Fed. Cas. No. 5788), Mr. Chief Justice Taney, sitting on circuit in Maryland, declined to apply the rule in that particular case. The cause was tried in November, 1851, and more than two years after, at November term, 1853, application was made to the chief justice to seal a bill of exceptions. Hochster v. De la Tour was decided in June, 1853, and the decision of the Circuit Court had apparently been contrary to the rule laid down in that case. The chief justice refused to seal the bill, chiefly on the ground that under the circumstances the application came too late, but also on the ground that there was no error, as the rule was only applicable to contracts of the special character involved in that case, and the chief justice said as to the contract in hand, by which defendant engaged to pay certain sums of money on certain days: "It has never been supposed that notice to the holder of a bond, or a promissory note, or bill of exchange, that the party would not (from any cause) comply with the contract, would give to the holder an immediate cause of action upon which he might sue before the time of payment arrived."

The rule is disapproved in Daniels v. Newton (114 Mass. 530) and in Stanford v. McGill (6 N. D. 536, 38 L. R. A. 760, 72 N. W. 938) on elaborate consideration. The opinion of Judge Wells in Daniels v. Newton is generally regarded as containing all that could be said in opposition to the decision of Hochster v. De la Tour, and one of the propositions on which the opinion rests is that the adoption of the rule in the instance of ordinary contracts would necessitate its adoption in the case of commercial paper. But we are unable to assent to that view. In the case of an ordinary money contract, such as a promissory note, or a bond, the consideration has passed; there are no mutual obligations; and cases of that sort do not fall within the reason of the rule.

In Nichols v. Scranton Steel Co. (137 N. Y. 487), Mr. Justice Peckham, then a member of the court of appeals of New York, thus expresses the distinction:

"It is not intimated that in the bald case of a party bound to pay a promissory note which rests in the hands of the payee, but which is not yet due, such note can be made due by any notice of the maker that he does not intend to pay it when it matures. We decide simply this case

33, 38 N. E. 773; Burtis v. Thompson, 42 N. Y. 246, 1 Am. Rep. 516; Windmuller v. Pope, 107 N. Y. 647, 14 N. E. 436; Mountjoy v. Metzger, 9 Phila. 10; Zuck v. McClure, 98 Pa. 541; Hocking v. Hamilton, 158 Pa. 107, 27 Atl. 836; Dugan v. Anderson, 36 Md. 567, 11 Am. Rep. 509; Hosmer v. Wilson, 7 Mich. 294, 74 Am. Dec. 716; Platt v. Brand, 26 Mich. 173; Crabtree v. Messersmith, 19 Iowa, 179; McCormick v. Basal, 46 Iowa, 235; Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275; Cobb v. Hall, 33 Vt. 233; Davis v. Grand Rapids School Furniture Co., 41 W. Va. 717, 24 S. E. 630; and other cases.

where there are material provisions and obligations interdependent. In such case, and where one party is bound, from time to time, as expressed, to deliver part of an aggregate and specified amount of property to another, who is to pay for each parcel delivered at a certain time and in a certain way, a refusal to be further bound by the terms of the contract or to accept further deliveries, and a refusal to give the notes already demandable for a portion of the property that has been delivered, and a refusal to give any more notes at any time or for any purpose in the future, or to pay moneys at any time, which are eventually to be paid under the contract, all this constitutes a breach of the contract as a whole, and gives a present right of action against the party so refusing to recover damages which the other may sustain by reason of this refusal."

We think it obvious that both as to renunciation after commencement of performance and renunciation before the time for performance has arrived, money contracts, pure and simple, stand on a different footing from executory contracts for the purchase and sale of goods.

The other proposition on which the case of Daniels v. Newton was rested is that until the time for performance arrives neither contracting party can suffer any injury which can form a ground of damages. Wells, J., said: "An executory contract ordinarily confers no title or interest in the subject-matter of the agreement. Until the time arrives when by the terms of the agreement he is or might be entitled to its performance, he can suffer no injury or deprivation which can form a ground of damages. There is neither violation of right, nor loss upon which to found an action."

But there are many cases in which, before the time fixed for performance, one of the contracting parties may do that which amounts to a breach and furnishes a ground of damages. It has always been the law that where a party deliberately incapacitates himself or renders performance of his contract impossible, his act amounts to an injury to the other party, which gives the other party a cause of action for breach of contract; yet this would seem to be inconsistent with the reasoning in Daniels v. Newton, though it is not there in terms decided "that an absolute refusal to perform a contract, after the time and under the conditions in which plaintiff is entitled to require performance, is not a breach of the contract, even although the contract is by its terms to continue in the future." Parker v. Russell, 133 Mass. 74.

In truth, the opinion goes upon a distinction between cases of renunciation before the arrival of the time of performance and those of renunciation of unmatured obligations of a contract while it is in course of performance, and it is said that before the argument on the ground of convenience and mutual advantage to the parties can properly have weight, "the point to be reached must first be shown to be consistent with logical deductions from the strictly legal aspects of the case."

We think that there can be no controlling distinction on this point between the two classes of cases, and that it is proper to consider the reasonableness of the conclusion that the absolute renunciation of particular contracts constitutes such a breach as to justify immediate action and recovery therefor. The parties to a contract which is wholly executory have a right to the maintenance of the contractual relations up to the time for performance, as well as to a performance of the contract when due. If it appears that the party who makes an absolute refusal intends thereby to put an end to the contract so far as performance is concerned, and that the other party must accept this position, why should there not be speedy action and settlement in regard to the rights of the parties? Why should a *locus pœnitentiæ* be awarded to the party whose wrongful action has placed the other at such disadvantage? What reasonable distinction *per se* is there between liability for a refusal to perform future acts to be done under a contract in course of performance and liability for a refusal to perform the whole contract made before the time for commencement of performance?

As Lord Chief Justice Cockburn observed in Frost v. Knight, the promisee has the right to insist on the contract as subsisting and effective before the arrival of the time for its performance, and its unimpaired and unimpeached efficacy may be essential to his interests, dealing as he may with rights acquired under it in various ways for his benefit and advantage. And of all such advantage, the repudiation of the contract by the other party, and the announcement that it never will be fulfilled, must of course deprive him. While by acting on such repudiation and the taking of timely measures, the promisee may in many cases avert, or, at all events, materially lessen, the injurious effects which would otherwise flow from the nonfulfillment of the contract.

During the argument of Cort. v. Ambergate Railway Co. (17 Q. B. 127), Erle, J., made this suggestion: "Suppose the contract was that plaintiff should send a ship to a certain port for cargo, and defendant should there load one on board; but defendant wrote word that he could not furnish a cargo; must the ship be sent to return empty?" And if it was not necessary for the ship owner to send his ship, it is not perceived why he should be compelled to wait until the time fixed for the loading of the ship at the remote port before bringing suit upon the contract.

If in this case these ten hop contracts had been written into one contract for the supply of hops for five years in installments, then when the default happened in October, 1896, it cannot be denied that an immediate action could have been brought in which damages could have been recovered in advance for the breach of the agreement to deliver during the two remaining years. But treating the four

outstanding contracts as separate contracts, why is it not equally reasonable that an unqualified and positive refusal to perform them constitute such a breach that damages could be recovered in an immediate action? Why should plaintiff be compelled to bring four suits instead of one? For the reasons above stated, and having reference to the state of the authorities on the subject, our conclusion is that the rule laid down in Hochster v. De la Tour is a reasonable and proper rule to be applied to this case and in many others rising out of the transactions of commerce of the present day.

As to the question of damages, if the action is not premature, the rule is applicable that plaintiff is entitled to compensation based, as far as possible, on the ascertainment of what he would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of which he ought reasonably to have availed himself. If a vendor is to manufacture goods, and during the process of manufacture the contract is repudiated, he is not bound to complete the manufacture, and estimate his damages by the difference between the market price and the contract price, but the measure of damage is the difference between the contract price and the cost of performance. Hinckley v. Pittsburg Bessemer Steel Co., 121 U. S. 264. Even if in such cases the manufacturer actually obtains his profits before the time fixed for performance, and recovers on a basis of cost which might have been increased or diminished by subsequent events, the party who broke the contract before the time for complete performance cannot complain, for he took the risk involved in such anticipation. If the vendor has to buy instead of to manufacture, the same principle prevails, and he may show what was the value of the contract by showing for what price he could have made sub-contracts, just as the cost of manufacture in the case of a manufacturer may be shown. Although he may receive his money earlier in this way, and may gain, or lose, by the estimation of his damage in advance of the time for performance, still, as we have seen, he has the right to accept the situation tendered him, and the other party cannot complain.

In this case plaintiffs showed at what prices they could have made sub-contracts for forward deliveries according to the contracts in suit, and the difference between the prices fixed by the contracts sued on and those was correctly allowed.

Judgment affirmed.[1]

9 Cyc. 636–639 (19–37); W. P. 360–361 (12–13); 15 H. L. R. 153; 15 H. L. R. 306; 15 H. L. R. 317; 16 H. L. R. 523; 20 H. L. R. 233; 4 C. L. R. 64; 6 C. L. R. 589; 11 C. L. R. 680.

[1] See for an extended argument to the contrary Stanford v. McGill, 6 N. Dak. 536.

In Kelly v. Insurance Co., 186 N. Y. 16, the court declined to apply the

ZUCK & HENRY *v.* McCLURE & CO.

98 PENNSYLVANIA STATE, 541.—1881.

MR. JUSTICE PAXSON. This action was commenced in the court below on the 29th day of November, 1879, and was to recover about

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doctrine of anticipatory breach where a mutual life insurance company was alleged to have wrongfully declared the insurance contract void and forfeited. The court said: "If the maker of a promissory note, given for borrowed money and due one year after date, notifies the holder the next day that he repudiates it and will not pay it, can the holder sue at once? Can a mortgagor make his mortgage due before the law day by repudiating it in advance? The rule that renunciation of a continuous executory contract by one party before the day of performance gives the other party the right to sue at once for damages, is usually applied only to contracts of a special character, even in the jurisdictions where it obtains at all. It is not generally applied to contracts for the payment of money at a future time and in some States the principle is not recognized in any way whatever. Daniels v. Newton, 114 Mass. 530, 19 Am. Rep. 384; Stanford v. McGill, 6 N. D. 536, 72 N. W. 938, 38 L. R. A. 760; Carstens v. McDonald, 38 Neb. 858, 57 N. W. 757; King v. Waterman, 55 Neb. 324, 75 N. W. 830. In other States and in the Federal courts the principle is adopted but applied with caution. Roehm v. Horst, 178 U. S. 1, 17, 18, 20 Sup. Ct. 780, 44 L. Ed. 953; Schmidt v. Schnell, 7 Ohio Dec. 657; Brown v. Odill, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660; Roebling's Sons v. Fence Co., 130 Ill. 660, 22 N. E. 518; Unexcelled Fire Works Co. v. Polites, 130 Pa. 536, 18 Atl. 1058, 17 Am. St. Rep. 788. In this State it seems to be limited to contracts to marry (Burtis v. Thompson, 42 N. Y. 246, 1 Am. Rep. 516); for personal services (Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285) and for the manufacture or sale of goods (Windmuller v. Pope, 107 N. Y. 674, 14 N. E. 436; Nichols v. Scranton Steel Co., 137 N. Y. 471, 33 N. E. 561). At least we have not extended it to mutual life insurance policies, perhaps for the reason that the question of fact opened to unscrupulous persons by such extension might undermine the solvency of the company and inflict gross injustice upon the other policyholders."

Renunciation must be unequivocal.—In Dingley v. Oler, 117 U. S. 490, the court held: "In Smoot's Case (15 Wall. 36) this court quoted with approval the qualification stated by Benjamin on Sales (1st ed. 424, 2d ed. § 568) that, 'A mere assertion that the party will be unable, or will refuse to perform his contract, is not sufficient; it must be a distinct and unequivocal absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made; for, if he afterwards continue to urge or demand a compliance with the contract, it is plain that he does not understand it to be at an end.' We do not find any such refusal to have been given or acted upon in the present case, and the facts are not stronger than those in Avery v. Bowden (5 El. & Bl. 714; S. C. 6 El. & Bl. 953), which were held not to constitute a breach or renunciation of the contract. The most recent English case on the subject is that of Johnstone v. Milling, in the Court of Appeal (16 Q. B. D. 460), decided in January of the present year, which holds that the words or conduct relied on as a breach of the contract by anticipation must amount to a total refusal to perform it, and that that does not by itself amount to a breach of the contract unless so acted upon and adopted by the other party."

$1,500 for coke delivered by the plaintiffs to the defendants during the previous October. There was no serious dispute as to either the delivery of the coke or the amount; but the defendants set up as a defence the breach of a contract on the part of the plaintiffs for future deliveries of coke. To state said contract briefly, the plaintiffs had agreed to sell and deliver to the defendants the entire product of their Eldorado works, comprising forty ovens, at a fixed price per ton, and also the product of all other ovens built by them during the continuance of the contract. This contract plainly appears by the correspondence between the parties and was finally closed on Nov. 11, 1879. On the 19th of the same month the plaintiffs notified the defendants in writing that they would not deliver the coke. On the 4th of December, four days after the delivery was to have commenced under the contract, the defendants wrote to the plaintiffs as follows: "We beg to draw your attention to contract between us by which you agree to furnish us the product of the Eldorado Coke Works (forty ovens); also product of ovens that may be built during the continuance of the contract from Dec. 1, 1879, to May 31, 1880, inclusive, and to advise you that we have been and are now prepared to receive the said coke under said contract. If shipments on our account are not at once commenced, we will go into the market and buy an equal amount of coke which you fail to deliver us, and will hold you responsible for any difference in price which we may have to pay, and will retain the balance which we now have in our hands to secure us against any loss or damage which we may sustain from your failure to comply with contract."

The defendants upon the trial below were allowed to set off their damages by reason of the breach of the above contract, and the jury found a verdict in their favor for $36,150. The single specification of error raises the question whether there was any breach at the time the suit was commenced.

A mere notice of an intended breach is not of itself a breach of the contract. It may become so if accepted and acted on by the other party. If the defendants had accepted the plaintiffs' notice of breach contained in their letter of November 19 and acted upon it, there would plainly have been a breach of the contract. The plaintiffs in such case could not have relieved themselves by commencing to deliver the coke on December 1, but must have been held to all the legal consequences of the breach. The defendants, however, on December 4, still insist upon compliance. They say "they are now prepared to receive said coke under said contract." This certainly kept the contract alive as to both parties. The plaintiffs could have gone on and delivered the coke on December 4, in which case there would have been no breach and no damages. The notice of an intention not to perform the contract, if not accepted by the other party as a present

breach, remains only a matter of intention, and may be withdrawn at any time before the performance is in fact due; but if not in fact withdrawn it is evidence of a continued intention to refuse performance down to and inclusive of the time appointed for performance. Ripley v. McClure, 4 Ex. 345; Leake on the Law of Contracts, 873. The promisee may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance. But in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. Leake on Contracts, *supra.*

It follows from the foregoing principles that on November 29 when the action was commenced below, there was no breach of the contract which the defendants could set up as a set-off to the plaintiff's claim. Nor does it help the defendants that when the cause was tried the breach was complete. The date of the commencement of the suit is the obvious test in such cases. Morrison v. Moreland, 15 S. & R. 61; Carpenter v. Butterfield, 3 Johns. Cases, 144.

There was error in not affirming the plaintiffs' eighth point.

Judgment reversed and a *venire facias de novo* awarded.

9 Cyc. 637 (30-31); W. P. 361 (13); 367 (39).

(*ii.*) *Impossibility created by one party before performance due.*

WOLF *v.* MARSH.

54 CALIFORNIA, 228.—1880.

Action on an instrument in writing. Judgment for plaintiff. Defendant appeals.

The instrument was as follows:

"MARTINEZ, November 24th, 1866.

"For value received, I promise to pay to S. Wolf, or order, four hundred and forty-nine dollars, with interest at one per cent per month from date until paid, principal and interest payable in United States gold coin. This note is made with the express understanding that if the coal mines in the Marsh Ranch yield no profits to me, then this note is not to be paid, and the obligation herein expressed shall be null and void.

"C. P. MARSH."

On November 1, 1871, defendant conveyed his interest in the ranch to one Williams. Up to that date the mines had yielded defendant no profits.

SHARPSTEIN, J. . . . Before the mines had yielded any profits to the defendant, he sold and conveyed his interest in them to a stranger. By so doing he voluntarily put it out of his power ever to realize any profits from the mines. However great the yield of profits from them might be after that, they could yield none to him. And the principle is elementary, that, "if one voluntarily puts it out of his power to do what he has agreed, he breaks his contract, and is immediately liable to be sued therefor, without demand, even though the time specified for performance has not expired." Bishop on Cont., § 690 (1426).

That this case is within that principle, we do not entertain a doubt. When the note was executed, the defendant was a half owner of the mines, which were leased on such terms that the production of coal from them must have yielded him a profit. After making the note, he voluntarily committed an act which made it impossible for the contingency upon which the note would become due and payable ever to arise. When he did that, he violated his contract, and the note at once became due and payable; and as this action was commenced within four years after that, it follows that the judgment and order of the court appealed from must be affirmed.

9 Cyc. 639–641 (39–48); W. P. 361 (13–15); 8 H. L. R. 112.

DELAMATER *v.* MILLER.

1 COWEN (N. Y.), 75.—1823.

Assumpsit by Miller against Delamater; for that the former had exchanged his horse with one Schermerhorn for his (S.'s) watch, which was in Delamater's possession at his (D.'s) house; and which he, being present at the contract, agreed to keep and deliver to Miller, who said he should call for it on the Saturday following. Miller did not demand it till the Sunday following, when Delamater refused to deliver it, assuming to retain it for a dollar due him from Schermerhorn; and he afterwards gave up the watch to Schermerhorn, who sold it. Judgment for plaintiff.

Curia. The defendant was not bound to regard the demand on Sunday (vid. Cowen's Treatise, 135, and the cases there cited); but, as the defendant parted with the watch, and thereby put it out of his power to perform the contract, the plaintiff was excused from the necessity of making any demand. Sir Anthony Main's Case, 5 Rep. 21,—the 2d resolution in that case.

And the judgment was affirmed.

9 Cyc. 639–641 (39–48).

(*iii.*) *Renunciation in the course of performance.*

HALE *et al. v.* TROUT *et al.*

35 CALIFORNIA, 229.—1868.

Action for contract price of lumber delivered, and for damages for breach of contract by defendants in declaring the contract at an end and refusing to receive any more lumber under it. Judgment for plaintiffs for lumber delivered, but not for breach. Plaintiffs appeal.

SAWYER, C. J. . . . Conceding a breach to have occurred on the part of the defendants, it is claimed on their behalf that the plaintiffs had but one of three courses to pursue: firstly, to rescind the contract and sue for the value of the lumber delivered; secondly, proceed to manufacture and tender the lumber, and sue upon the contract from month to month for a corresponding amount of the contract price; or, thirdly, proceed to manufacture and tender the lumber according to the terms of the contract, till the whole two million feet should be delivered or tendered, and then sue for the entire amount at once. And the court below must either have adopted this theory, or have rendered judgment upon the hypothesis that the only breach on the part of the defendants consisted in not paying for a part of the lumber delivered and accepted, and that such non-payment did not constitute a breach of the contract entitling the plaintiffs to damages beyond the price of the amount of lumber delivered and received, but not paid for. But if it be conceded that plaintiffs were entitled to go on manufacturing and tendering the lumber, and then sue for the contract price, as suggested, as to which there may be some doubt (see Clark v. Marsiglia, 1 Den. 318; Derby *et al.* v. Johnson *et al.*, 21 Vt. 22), it is clear, both on principle and authority, that the plaintiffs were entitled to pursue another course, the one adopted in this action; that is to say, to treat the contract as wholly broken by the defendants, and sue to recover, firstly, the contract price for the lumber actually delivered and received under the contract; and, secondly, upon the breach to recover the entire damages resulting from the breach on the part of defendants in putting an end to and refusing to receive any more lumber under the contract.

It may be that the monthly payments called for by the contract were absolutely necessary to enable the plaintiffs to perform their covenants, and that without such payments it would have been impossible for them to proceed. It would require a large amount of capital for plaintiffs to proceed in the manufacture of lumber for a period of three years without receiving payments. Besides, they were compelled to erect, and did erect, a new mill for the express purpose of enabling them to fulfill their contract. It would be equally onerous to be compelled to sue each month, and recover the amount of the several

monthly payments at the end of a protracted law suit. They were not bound to do so under the terms of their contract. There was not merely a neglect of payment, but they were notified by the defendants that they should treat the contract as at an end, and would receive no more lumber under it. Defendants thereby prevented the plaintiffs from fulfilling their contract. The plaintiffs, after this, even if they would be justified in so doing, could not be required, as a condition precedent to obtaining adequate relief for the breach, to go on manufacturing lumber at the risk of finding no market for it, or of being unable to collect from the defendants the amounts that might become due under the contract. There was a total breach of an entire contract, and the plaintiffs were entitled to sue upon the breach immediately, and recover the entire damages resulting from it, without waiting for the time for full performance to elapse. The following authorities sustain this view: Shaffer v. Lee, 8 Barb. 415; Masterton v. Mayor of Brooklyn, 7 Hill, 61; Clark v. Mayor of N. Y., 4 N. Y. (4 Comst.) 343; Royalton v. R. and W. Turnpike Co., 14 Vt. 311; Derby v. Johnson, 21 Vt. 22; Jones v. Judd, 4 N. Y. 414; Phil., Wil. and Balt. R. R. Co. v. Howard, 13 Howard, U. S. 313, 314, 344; Fish v. Folley, 6 Hill, 55; Shannon v. Comstock, 21 Wend. 460; Seaton v. Second Municipality of New Orleans, 3 La. Ann. R. 45; Rogers v. Parham, 8 Cobb, Ga. 190; Planche v. Colburn, 8 Bing. 15; Clossman v. Lacoste, 28 Eng. L. and Eq. 141.

The case of Masterton v. Mayor of Brooklyn, *supra,* was similar in principle to this. The suit was for a breach of a contract, whereby the plaintiff covenanted to furnish for a specified price, all the marble required to build the city hall in the city of Brooklyn, to be delivered from time to time, as required by the superintendent, and paid for in instalments as the work progressed. After the delivery of something over fourteen thousand feet, which was paid for, the defendants suspended the work, and like the defendants in this case, "refused to receive any more materials from the plaintiffs, though the latter were ready, and offered to perform." At the time of the suspension of the work, the entire quantity of marble remaining to be delivered, in order to fulfill the contract, was about eighty-nine thousand feet. Plaintiff claimed, and, in an action for damages on the breach, was allowed to prove, against the objection of the defendants, the difference between the cost of furnishing the marble and the contract price. This ruling presented one of the questions for determination on appeal, and it was decided in favor of the plaintiff. Mr. Chief Justice Nelson, in discussing the question, says:

"When the contract, as in this case, is broken before the arrival of the time for full performance, and the opposite party elects to consider it in that light, the market price on the day of the breach is to govern in the assessment of damages. . . . If there was a market value of the article in this case, the

question would be a simple one. As there is none, however, the parties will be obliged to go into an inquiry as to the actual cost of furnishing the article at the place of delivery." 7 Hill, 71, 72.

And this is what was done in the case now under consideration. And Mr. Justice Beardsley says:

"The plaintiffs were not bound to wait till the period has elapsed for the complete performance of the agreement, nor to make successive offers of performance in order to recover all their damages. They might regard the contract as broken up, so far as to absolve them for making further efforts to perform, and give a right to recover full damages, as for a total breach." *Id.* 75.

In the case of the Town of Royalton v. R. & W. Turnpike Co., there was a contract, by the terms of which the defendant covenanted to support and keep in repair for the term of twenty years a bridge which the plaintiff was bound to maintain, in consideration of which the plaintiff covenanted to pay the defendant the sum of twenty-five dollars per annum for the entire period of time. The defendant supported the bridge for a period of eight years, and then committed a breach by suffering it to go to decay, and refusing to support it longer. The suit was upon the contract for the breach, and it was held that the plaintiff was entiled to recover full damages, covering the entire twelve years yet unexpired, at the time of the commencement of the suit. The court, by Redfield, J., say:

"The rule of damages in this case should have been to give the plaintiffs the difference between what they were to pay the defendant and the probable expense of performing the contract, and thus assess the entire damages for the remaining twelve years." 14 Vt. 324.

So in Phil., Wil. and Balt. R. R. Co. v. Howard, upon a contract for grading and doing certain work on a railroad, in which it was provided that "in case the party of the second part at any time be of opinion that this contract is not duly complied with by the party of the first part, or that it is not in due progress of execution, or that the said party of the first part is irregular or negligent, then and in such case he shall be authorized to declare this contract forfeited, and thereupon the same shall be null." 13 How. 319. Subsequently, on the statement of the engineer that the contract was "not in due progress of execution," after reciting that the party of the first part had not complied with the contract, it was by the company "resolved that the said contract be and the same is hereby declared to be forfeited." Id. 313. Plaintiff sued, and one of the breaches relied on was for "fraudulently declaring the contract forfeited, and thereby depriving plaintiff of the gains which would otherwise have accrued to him on the completion of the contract." Id. 313. The court instructed the jury to the effect that if the company annulled the con-

tract, not for the reasons stated, but for the purpose of having the remaining work done cheaper than the contract price, the plaintiff was entitled to recover damages for the loss of profit sustained by the refusal of the company to permit him to finish the work contracted to be performed. In considering the rule of damages, the Supreme Court, per Curtis, J., say:

"Actual damages clearly include the direct and actual loss which plaintiff sustains *propter rem ipsam non habitam*. And in case of a contract like this that loss is, among other things, the difference between the cost of doing the work and the price paid for it. This difference is the inducement and real consideration which causes the contractor to enter into the contract. For this he expends his time, exerts his skill, uses his capital, and assumes the risks which attend the enterprise. And to deprive him of it, when the other party has broken the contract, and unlawfully put an end to the work, would be unjust. There is no rule of law which requires us to inflict this injustice. . . . We hold it to be a clear rule that a gain or profit of which the contractor was deprived by the refusal of the company to allow him to proceed with and complete the work was a proper subject of damages." *Id.* 344.

In Clark v. Mayor of New York (4 New York, 343) the court say:

"But when the contract is terminated by one party against the consent of the other, the latter will not be confined to the contract price, but may bring his action for a breach of the contract, and recover as damages all that he may lose by way of profits in not being allowed to fulfill the contract; or he may waive the contract and bring his action on the common counts for work and labor generally, and recover what the work done is actually worth. But in the latter case, he will not be allowed to recover as damages anything for speculative profits, but the actual value of the work and materials must be the rule of damages. . . . If the party seeks to recover more than the actual worth of this work, in a case where he is prevented from performing the entire contract, he must resort to his action directly upon the contract."

And in Jones v. Judd (4 N. Y. 414) the court say:

"If the performance had been arrested by the act or omission of the defendants, the plaintiff would have had his election to treat the contract as rescinded, and recover, on a *quantum meruit*, the value of his labor, or he might sue upon the agreement and recover for the work completed, according to the contract, and for the loss in profits or otherwise which he had sustained by the interruption."

Now, what was done and what was said might be done in the cases cited, is precisely what was done in the case under consideration. The plaintiffs sued directly upon the contract, to recover the contract price for the lumber delivered and received, and directly upon the contract for the breach in declaring the contract at an end and refusing to take any more lumber under it. And the foregoing cases show that they may so sue and recover the whole damage sustained in consequence of the breach, without waiting for the time of performance to

elapse or repeating an offer to perform from month to month, as the time for delivery arrives, and that the rule of damages upon the breach is the clear profit which the plaintiffs would have made, that is to say, the difference between the contract price and what it would have cost the plaintiffs to manufacture and deliver the lumber according to the terms of the contract.

The cases cited by defendants are not in conflict with the authorities referred to in this opinion. Most of them do not touch the precise question, and are therefore not in point. The case of Rogers v. Parham (8 Cobb, 190) is against the respondents, and sustains the views here taken. The same may be said of Girard v. Taggart (5 S. & R. 19) so far as it bears upon the question. There was a sale of teas at auction, to be paid for in sixty, ninety, and one hundred and twenty days, the purchaser, on delivery of the teas, to give notes with approved indorsers. The purchaser finally refused to take the teas or give the notes. Thereupon the vendor sold the teas again at a much lower price, and sued at once to recover the difference. In the language of the chief justice, the action was "special, on the breach of the contract." Upon the question as to when the action could be brought, and the measure of damages, Mr. Justice Gibson said:

"The breach having put an end to every idea of further performance by either is a violation of the contract in all its parts, for which the seller may recover whatever damages he can prove he has sustained. The buyer, after having disaffirmed the sale, so far as he could by acts of his own, must not be permitted to treat the contract as still existing, for the purpose of being performed by him specifically. But the seller may, if he please, consider it existing only for the purpose of giving a remedy for the breach." 5 S. & R. 33.

See also opinion of Mr. Justice Duncan in same case (Id. 543); also Derby *et al.* v. Johnson *et al.*, 21 Vt. 22. Some principles stated in Fowler v. Armour (24 Ala. 194) seem to be favorable to respondents' view, but if so they are wholly against the current of authorities brought to our notice.

In this case the difference between the contract price and cost of performance, or the clear profits upon the amount of lumber remaining undelivered, the court found to be $6304.79, which sum should have been added to the amount for which judgment was rendered.

Judgment reversed, and the District Court directed to enter judgment upon the findings in accordance with the views expressed in this opinion.[1]

9 Cyc. 688 (16).

1 "When a party injured by the stoppage of a contract elects to rescind it, then, it is true, he cannot recover any damages for a breach of the contract, either for outlay or for loss of profits; he recovers the value of his services actually performed as upon a *quantum meruit*. There is then no question of

DERBY *et al. v.* JOHNSON *et al.*

21 VERMONT, 17.—1848.

Book account. Judgment for plaintiffs. Exceptions by defendants.

Plaintiffs contracted to do the stone work, masonry and blasting on three miles of railroad, defendants to pay specified prices per cubic yard. After working a month, plaintiffs were directed by defendants to cease further work, and complied. Plaintiffs presented an account of days' labor and material furnished by them, which was allowed on the basis of reasonable value.

HALL, J. It is insisted, in behalf of the defendants, that the request and direction of the defendants to the plaintiffs, to cease work

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losses or profits. But when he elects to go for damages for the breach of the contract, the first and most obvious damage to be shown is, the amount which he has been induced to expend on the faith of the contract, including a fair allowance for his own time and services. If he chooses to go further, and claims for the loss of anticipated profits, he may do so, subject to the rules of law as to the character of profits which may be thus claimed. It does not lie, however, in the mouth of the party, who has voluntarily and wrongfully put an end to the contract, to say that the party injured has not been damaged at least to the amount of what he has been induced fairly and in good faith to lay out and expend (including his own services), after making allowance for the value of materials on hand; at least it does not lie in the mouth of the party in fault to say this, unless he can show that the expenses of the party injured have been extravagant, and unnecessary for the purpose of carrying out the contract. . . . It is to be observed that when it is said in some of the books, that when one party puts an end to the contract, the other party cannot sue on the contract, but must sue for the work actually done under it, as upon a *quantum meruit*, this only means that he cannot sue the party in fault upon the stipulations contained in the contract, for he himself has been prevented from performing his own part of the contract upon which the stipulations depend. But surely, the wilful and wrongful putting an end to a contract, and preventing the other party from carrying it out, is itself a breach of the contract for which an action will lie for the recovery of all damage which the injured party has sustained. The distinction between those claims under a contract which result from a performance of it on the part of the claimant, and those claims under it which result from being prevented by the other party from performing it, has not always been attended to. The party who voluntarily and wrongfully puts an end to a contract and prevents the other party from performing it, is estopped from denying that the injured party has not been damaged to the extent of his actual loss and outlay fairly incurred."—United States v. Behan, 110 U. S. 338, 345–7. See also Danforth v. Tennessee &c. Ry. Co., 93 Ala. 614; Nichols v. S. S. Co., 137 N. Y. 471.

That there may be such conduct on the part of the defendant as to warrant the plaintiff in rescinding the contract and recovering on a *quantum meruit*, and yet not warrant him in regarding the contract as renounced by the defendant so as to sustain an action for damages for a breach, see Wharton v. Winch, 140 N. Y. 287.

and abandon the execution of the contract, is to be considered in the light of a proposition to the plaintiffs, which they were at liberty to accede to, or disregard, and that, having acquiesced in it by quitting the work, the contract is to be treated as having been relinquished by the mutual consent of the parties. But we do not look upon it in that light. The direction of the defendants to the plaintiffs to quit the work was positive and unequivocal; and we do not think the plaintiffs were at liberty to disregard it. In Clark v. Marsiglia (1 Denio, 317) it was held, that the employer, in a contract for labor, had the power to stop the completion of it if he chose,—subjecting himself thereby to the consequences of a violation of his contract; and that the workman, after notice to quit work, had not the right to continue his labor and claim pay for it. And this seems to be reasonable. For otherwise the employer might be entirely ruined, by being compelled to pay for work, which an unexpected change of circumstances, after the employment, would render of no value to him. If, for instance, in this case the location of the railroad had been changed from the place where the work was contracted to be done, or if the plaintiffs' [defendants'?] employers had become wholly insolvent after the making of the contract, the injury to them, if they had no power to stop the work, might be immense and altogether without remedy. Rather than an injury so greatly disproportioned to that which could possibly befall the workman should be inflicted on the employers, it seems better to allow them to stop work, taking upon themselves, of course, all the consequences of such a breach of their contract. Such, we think, is and ought to be the law. We are therefore satisfied that the plaintiffs were prevented from executing their contract by the act of the defendants, and that the contract is not to be treated as having been mutually relinquished.

Treating the plaintiffs as having been prevented from executing their part of the contract by the act of the defendants, we think the plaintiffs are entitled to recover, as upon a *quantum meruit,* the value of the services they had performed under it, without reference to the rate of compensation specified in the contract. They might doubtless have claimed the stipulated compensation, and have introduced the contract as evidence of the defendants' admission of the value of the services. And they might, in addition, in another form of action, have recovered their damages for being prevented from completing the whole work. In making these claims the plaintiffs would be acting upon the contract as still subsisting and binding; and they might well do so; for it doubtless continued binding on the defendants. But we think the plaintiffs, upon the facts stated in the report of the auditor, were at liberty to consider the contracts as having been rescinded from the beginning, and to claim for the services they had performed, without reference to its terms.

The defendants, by their voluntary act, put a stop to the execution of the work, when but a fractional part of that which had been contracted for had been done, and while a large portion of that which had been entered upon was in such an unfinished condition as to be incapable of being measured and its price ascertained by the rate specified in the contract. Under these circumstances, we think the defendants have no right to say that the contract, which they have thus repudiated, shall still subsist for the purpose of defeating a recovery by the plaintiffs of the actual amount of labor and materials they have expended.

In Tyson v. Doe (15 Vt. 571), where the defendant, after a part performance of a contract for delivering certain articles of iron castings, prevented the plaintiff from farther performing it, the contract was held to be so far rescinded by the defendant as to allow the plaintiff to sustain an action on book for the articles delivered under it, although the time of credit for the articles, by the terms of the contract, had not expired. The court in that case say, "that to allow the defendant to insist on the stipulation in regard to the time of payment, while he repudiates the others, would be to enforce a different contract from that which the parties entered into." The claim now made in behalf of the defendants, that the rate of compensation specified in the contract should be the only rule of recovery, would, if sustained, impose upon the plaintiffs a contract which they never made. They did, indeed, agree to do all the work of a certain description on three miles of road, at a certain rate of compensation per cubic yard; but they did not agree to make all their preparations and do but a sixteenth part of the work at that rate; and it is not to be presumed that they would have made any such agreement. We are not therefore disposed to enforce such an agreement against them.

The case of Koon v. Greenman (7 Wend. 121) is much relied upon by the counsel for the defendants. In that case the plaintiff had contracted to do certain mason work at stipulated prices, the defendant finding materials. After a part of the work had been done, the defendant neglecting to furnish materials for the residue, the plaintiff quit work and brought his action of general assumpsit. The court held he was not entitled to recover the value of the work, but only according to the rate specified. The justice of the decision is not very apparent; and it does not appear to be sustained by the authorities cited in the opinion, they being all cases, either of deviations from the contract in the manner of the work, or delays of performance in point of time. But that case, if it be sound law, is distinguishable from this in at least two important particulars. In that case the plaintiff was prevented from completing his contract by the mere negligence of the defendant; in this by his voluntary and positive

command. In that case there does not appear to have been any difficulty in ascertaining the amount to which the plaintiff would be entitled, according to the rate specified in the contract; whereas in this it is altogether impracticable to ascertain what sum would be due the plaintiffs, at the stipulated prices, for the reason that when the work was stopped by the defendants, a large portion of it was in such an unfinished state as to be incapable of measurement. That case is therefore no authority against the views we have already taken.

The judgment of the County Court is therefore affirmed.[1]

9 Cyc. 688 (16); W. P. 337 (28); 349 (69); 550 (39).

CONNOLLY *v.* SULLIVAN.

173 MASSACHUSETTS, 1.—1899.

Contract, to recover a balance alleged to be due plaintiff for work and labor in excavating a lot for defendant. There was an express contract under which plaintiff agreed to do the work for $750. After

[1] "When the contract is terminated by one party against the consent of the other, the latter will not be confined to the contract price, but may bring his action for a breach of the contract, and recover as damages all that he may lose by way of profits in not being allowed to fulfill the contract; or he may waive the contract and bring his action on the common counts for work and labor generally, and recover what the work done is actually worth. . . . If the party seeks to recover more than the actual worth of his work, in a case where he has been prevented from performing the entire contract, he must resort to his action directly upon the contract; but when he elects to consider the contract rescinded, and goes upon *quantum meruit*, the actual value is the rule of damages."—Pratt, J., in Clark v. Mayor, 4 Comstock (4 N. Y.), 338. *Contra:* Doolittle v. McCullough, 12 Ohio St. 360, where it is held that the plaintiff suing in *quantum meruit* is restricted in his recovery to the contract rate, and Clark v. Mayor is criticised. But see Wellston Coal Co. v. Franklin Co., 57 Oh. St. 182.

Where the work is performed on the plaintiff's own material, in which the defendant has no interest, the only remedy is on the special contract in an action for damages for breach. Curtis v. Smith, 48 Vt. 116.

In cases where the plaintiff has *fully* performed his part of the contract, but the defendant refuses to perform his, the value of what the defendant promised (money, property, or services), and not the value of the plaintiff's services or property, is the measure of the recovery. Bradley v. Levy, 5 Wis. 400; Anderson v. Rice, 20 Ala. 239; Porter v. Dunn, 61 Hun, 310; S. C. 131 N. Y. 314. *Contra:* Hudson v. Hudson, 87 Ga. 678, where the court says: "It seems the fairest and best way of adjusting these matters is to allow the son to recover of the administrator, upon a *quantum meruit*, the actual value of his services, but the amount must in no event exceed the value of the home place" [promised]. *A fortiori*, the plaintiff cannot recover for part performance an amount in excess of that stipulated for full performance. McClair v. Austin, 17 Col. 576.

the work was partly done defendant directed plaintiff to stop. The plaintiff (who was losing largely under his contract) did not object to stopping work and acquiesced in the direction. The work then done was fairly worth $1200; to complete it was worth $925. Defendant had paid plaintiff $250. The worth of the work done if measured by the contract price was $425. The auditor found that if plaintiff was prevented by defendant from completing the contract he was entitled to $950 ($1200 less $250 paid); if he stopped voluntarily with defendant's consent he was entitled to $175 ($425 less $250 paid). At the trial the judge directed a verdict for $950. Defendant alleged exceptions.

MORTON, J. The exceptions in this case were not only to the refusal of the court to give the rulings which were requested, but to the ruling by which the jury were directed to return a verdict for the plaintiff, irrespective of the contract price, for a sum which the auditor had found was the fair market value of all the work and labor performed and furnished, less what the defendant had paid on account; that is, as we understand the exceptions, the court ruled, in effect, as matter of law, against the objection of the defendant, that, on the auditor's report, the plaintiff was entitled to recover the amount for which the jury were directed to return a verdict, without regard to the contract price. The auditor's report was the only evidence in the case. It not only stated the general conclusions to which the auditor came, but it stated particular facts and circumstances relating to those conclusions, and we think that the defendant was entitled to go to the jury, if he so desired, on the question whether, upon the auditor's report, the plaintiff was prevented by the defendant from going on with the contract, or whether it was terminated with his consent, manifested in such a manner that the defendant was justified in acting upon it. Peaslee v. Ross, 143 Mass. 275; Emerson v. Patch, 129 Mass. 299; Marland v. Stanwood, 101 Mass. 470, 478.

If the former was the case, then the plaintiff would be entitled to recover, independently of the contract price, the value of the labor and materials furnished, and of which the defendant had had the benefit; and the contract price would be important or admissible only so far as it might tend to throw light, if at all, on the value of the labor and materials actually furnished. Fitzgerald v. Allen, 128 Mass. 232.

If the latter was the case, then we think that the plaintiff's right of recovery would be limited by the contract price, and the amount recoverable would depend on the ratio of the value of the labor and material actually furnished to what should be found to be the total cost of the work when completed according to the contract. See Veazie v. Hosmer, 11 Gray, 396; Atkins v. Barnstable, 97 Mass. 428; Hayward v. Leonard, 7 Pick. 181; Koon v. Greeman, 7 Wend. 121.

In other words, in that event we think that the rule adopted by the auditor would be substantially correct.

Exceptions sustained.

9 Cyc. 688 (16); W. P. 337 (24–28).

CLARK *v.* MARSIGLIA.

1 DENIO (N. Y.), 317.—1845.

Assumpsit for work, labor, and material. Plea, non-assumpsit. Judgment for plaintiff. Defendant brings error.

Defendant delivered a number of paintings to plaintiff to be cleaned and repaired at a specified price for each. After plaintiff had begun work on them defendant directed him to stop, but plaintiff persisted and claims to recover for the whole. The court charged that as plaintiff had begun the work, he had a right to finish and defendant could not revoke the order.

Per Curiam. The question does not arise as to the right of the defendant below to take away these pictures, upon which the plaintiff had performed some labor, without payment for what he had done, and his damages for the violation of the contract, and upon that point we express no opinion. The plaintiff was allowed to recover as though there had been no countermand of the order; and in this the court erred. The defendant, by requiring the plaintiff to stop work upon the paintings, violated his contract, and thereby incurred a liability to pay such damages as the plaintiff should sustain. Such damages would include a recompense for the labor done and materials used, and such further sum in damages as might, upon legal principles, be assessed for the breach of the contract; but the plaintiff had no right, by obstinately persisting in the work, to make the penalty upon the defendant greater than it would otherwise have been.

To hold that one who employs another to do a piece of work is bound to suffer it to be done at all events, would sometimes lead to great injustice. A man may hire another to labor for a year, and within the year his situation may be such as to render the work entirely useless to him. The party employed cannot persist in working, though he is entitled to the damages consequent upon his disappointment. So if one hires another to build a house, and subsequent events put it out of his power to pay for it, it is commendable in him to stop the work, and pay for what has been done and the damages sustained by the contractor. He may be under a necessity to change his residence; but upon the rule contended for, he would be obliged to have a house which he did not need and could not use. In all such cases the just claims of the party employed are satisfied when he is

fully recompensed for his part performance and indemnified for his loss in respect to the part left unexecuted; and to persist in accumulating a larger demand is not consistent with good faith towards the employer. The judgment must be reversed, and a *venire de novo* awarded.

Judgment reversed.[1]

9 Cyc. 638 (34-35); W. P. 349 (69).

(*iv.*) *Impossibility created by one party in the course of performance.*

WOODBERRY *v.* WARNER.

53 ARKANSAS, 488.—1890.

Action upon a *quantum meruit* for services. Judgment for plaintiff. Defendant appeals.

Defendant was the owner of a steamboat, the Allen, and on January 1, 1886, employed plaintiff as pilot, agreeing to pay him $720 a year, and, when the net earnings of the boat should amount to $8000, to make over to him a fourth interest in the boat. A few months later defendant bought another boat which he ran in opposition to the Allen, thus reducing her profits. On May 31, 1888, defendant sold the Allen without plaintiff's consent, and before she had earned the net profits specified in the contract. Plaintiff claimed his services were worth $1000 a year, or $280 a year more than he had received.

[1] "The person who has not broken his part of the compact may, at his option, extend to the person who has signified his purpose to violate the agreement, an opportunity for repentance, measured by the time to elapse between the refusal to perform and the date when performance is to commence. . . . The party keeping the contract need not mitigate the damages by treating as final a premature repudiation thereof; but this is far from establishing the proposition that he may increase the amount to be paid by the other party by completing the contract after notice of repudiation, made on the day of performance, or made before that day, and never withdrawn, but, on the contrary, constantly insisted upon down to and including that day. . . . The question in all cases is whether one party has prevented performance by the other party at the time when performance by him is due. This can be done as well by preventing the taking of those preliminary steps, without which the final step cannot be taken, as by preventing the taking of such final step. These preliminary steps must often precede by many days the time of performance, and it therefore must follow that notice of refusal to carry out the contract, in such a case, given before the time of performance, will operate as a breach of the contract in case the time has arrived at which the person willing to keep the contract may enter upon the work under the contract."—Corliss, C. J., in Davis v. Bronson, 2 N. Dak. 300. See also for the distinction between repudiation before the time for performance begins and repudiation after such time, Kadish v. Young, 108 Ill. 170; Roebling's Sons' Co. v. Lock Stitch Fence Co., 130 Ill. 660.

Defendant contended that plaintiff could not sue in *quantum meruit*, but must sue for breach of contract and recover as damages the value of one-fourth of the boat at such time as her net earnings should have amounted to $8000.

Per Curiam. 1. The defendant having put it beyond his power to perform the contract according to its terms, the plaintiff was entitled to recover the value of his services over and above the amount he had received under the contract.

2. The terms of the contract, as alleged in the complaint, required the defendant to devote his personal services to the business of the steamer Allen. As the bill of exceptions does not purport to set forth the substance of all the testimony, the verdict is conclusive that the contract was such as the plaintiff alleged. Evidence therefore was admissible which tended to show that the defendant's conduct in devoting his services to another steamer decreased the earnings of the Allen, and thereby prevented the plaintiff from earning the interest in the Allen called for by the contract.

No other questions are argued by counsel, and there being no error as to these, the judgment is affirmed.

9 Cyc. 639 (39); W. P. 354 (86); 18 H. L. R. 64.

(v.) Breach by failure of performance of a term in the contract.

a. Conditional and unconditional performance, in general.

NORTHRUP *v.* NORTHRUP.

6 COWEN, (N. Y.), 296.—1826.

Declaration on covenant. Demurrer to plea, and joinder.

Defendant covenanted to pay certain rent due and in arrears on a certain farm, to one Tomlinson, and to pay all that should become due on March 25, 1825, the whole to be paid on that day. Plaintiff covenanted, that on defendant's so paying the rent, he, plaintiff, would give up and discharge a certain bond and mortgage. The action was for the non-payment of the rent.

Defendant pleaded that plaintiff did not, on March 25, give up and discharge the bond and mortgage, nor tender nor offer to do so, on that day, or before, or since.

SAVAGE, C. J. The plea is bad. The payment of the money to Tomlinson, on the day specified, is clearly a condition precedent. The performance by the plaintiff of his part of the agreement is not necessarily simultaneous; but was naturally to be subsequent. A general averment of his readiness to perform is all that can be necessary or proper. To aver a tender was certainly not necessary.

Lord Mansfield, in Jones v. Barkley (Doug. 690), makes three

classes of covenants. 1. Such as are mutual and independent, where separate actions lie for breaches on either side. 2. Covenants which are conditions, and dependent on each other, in which the performance of one depends on the prior performance of the other. 3. Covenants which are mutual conditions to be performed at the same time, as to which the party who would maintain an action must, in general, offer or tender performance.

I consider the plaintiff's covenant as clearly belonging to the second class. The defendant's covenant was absolute. The cases cited by the defendant's counsel relate to the third class.

The plaintiff must have judgment, with leave to the defendant to amend on payment of costs. Judgment for the plaintiff.[1]

9 Cyc. 642 (52); 645 (61); 720 (46-47).

HILL *v.* GRIGSBY *et.al.*

35 CALIFORNIA, 656.—1868.

Action upon nine promissory notes made jointly by defendants to plaintiff. Defense, that plaintiff, as a consideration for said notes, agreed to convey to defendants a half interest in certain property; that the amount sued for was the whole purchase money remaining unpaid; that before the commencement of the action plaintiff had conveyed the

[1] "The whole doctrine of implied dependency of mutual covenants and promises is a modern one. Indeed, not a trace of it is to be found prior to the time of Lord Mansfield. In early times the question could arise only with reference to mutual covenants, as mutual promises were not binding in law. As to mutual covenants it was well settled from an early period that they were to be deemed separate contracts and wholly independent of each other, unless one of them was made expressly dependent on the other. . . . As to mutual promises, it was no sooner decided that such promises were a sufficient consideration for each other, than it was held to follow as a consequence that they were independent of each other. . . . The case of Martindale v. Fisher (1 Wils. 88), shows that the old rule was regarded as still in full force as late as 1745."—Langdell, Cont., pp. 177-178, 179-180, 181. Lord Mansfield in Kingston v. Preston (1773, cited in Jones v. Barkley, Dougl. 684), "held that performance by the plaintiff was a condition precedent to performance by the defendant, *i. e.*, that the defendant's covenant was dependent upon the plaintiff's by implication. Lord Mansfield did not intimate that he was deciding contrary to what had been held for law from time immemorial, but such was the fact. The decision has been uniformly acquiesced in, however, from that day to this, and hence in effect it overruled a long line of decisions, and established the doctrine of general dependency by implication as it exists at the present day. . . . In Rawson v. Johnson (1 East, 203, 1801), mutual promises for the purchase and sale of goods were held to be mutually dependent, though each promise was absolute in terms, and no time was appointed for the performance of either. With this case, therefore, the doctrine of mutual dependency was completely established as it has ever since remained."—Langdell, Cont., pp. 183, 184, 185, 186.

property to another, and had not offered to perform by tendering a deed of the property to defendants. On motion the court struck out the answer. Judgment for plaintiff. Defendants appeal.

RHODES, J. The leading question is, whether plaintiff is entitled to recover upon certain promissory notes representing the unpaid portion of the purchase money for certain real estate, sold by the plaintiff to defendants, without conveying or offering to convey the property. The solution of the question depends upon the construction to be given to the bond or covenant of the plaintiff. The bond, after reciting the purchase and the terms of payment, proceeds as follows:

"Now, therefore, the said Hill agrees and binds himself, on condition that the said Grigsby and Smittle shall pay the sum of $18,000, less $8200 heretofore paid, with interest, as aforesaid, to execute and deliver to the said Smittle and Grigsby a good deed, conveying all his right, title, and interest of, in, and to the one undivided half interest in said mill and premises herein as aforesaid, which, if he shall well and truly do, the above obligation to be null and void and of no effect; otherwise the above obligation to be and remain in full force and effect. The said deed to be executed by the said Hill as soon as the full sum of $18,000 and interest, as above provided, is paid, and to be sufficient to convey to said Grigsby and Smittle one undivided half interest in and to said mill, free from all incumbrance."

In the first clause the plaintiff covenants to convey on condition that the defendants pay the price. These acts were plainly intended to be simultaneous, that is to say, the payment in full and conveyance. The words *"on condition"* are susceptible of no other interpretation. The second clause was added as if to put the matter beyond question. There the covenant is, to convey as soon as the full sum is paid. The conveyance must, of necessity, be executed concurrently with or before payment in full, or it will not be executed as soon as such payment is made.

Neither argument nor illustration will make the meaning of the covenants in respect to the time for their performance more apparent.

When the meaning of the terms employed in the covenants is ascertained, the application of the rules of law governing the performance of the covenants is not difficult. In a contract for the sale of real estate, where the purchaser covenants to pay the purchase money, and the vendor covenants to convey the premises at the time of payment, or upon the time of payment of the money, or as soon as it is paid,—and they all mean the same thing,—the covenants are mutual and dependent, and neither can sue without showing a performance, or an offer to perform, on his part; and performance, or the offer to perform, on the one part, is a condition precedent to the right to insist upon a performance on the other part. Barron v. Frink, 30 Cal. 486.

When the purchase money is payable in instalments, and the conveyances to be executed on the last day of payment, or upon the

payment of the whole price, or at any previous day, the covenants to pay the instalments falling due before the time appointed for the execution of the conveyance are independent covenants, and suit may be brought thereon without conveying or offering to convey.

The covenants to pay the instalments falling due on or after the day appointed for the conveyance are dependent covenants, and the vendor, in his suit to recover the same, whether he sues for those alone or joins instalments that became due before the time, must show a conveyance or offer to convey. In these respects, contracts of all kinds are governed by the same rule as covenants.

Questions covering the greater portion, if not the entire ground occupied by those presented here, were considered at an early day in this court, and the decisions accord with the views here expressed. Osborne v. Elliott, 1 Cal. 337; Folsom v. Bartlett, 2 Cal. 163. See also Barron v. Frink, 30 Cal. 486. It is very correctly said in Bank of Columbia v. Hagner (1 Pet. 455) that "in contracts of this description the undertakings of the respective parties are always considered dependent unless a contrary intention clearly appears"; and the reason assigned, as well as the rule, would be applicable here were the words of the covenant of doubtful import. "A different construction would in many cases lead to the greatest injustice, and a purchaser might have payment of the purchase money enforced upon him, and yet be disabled from procuring the property for which he paid it." The authorities in support of these principles are very numerous, and there is a greater degree of uniformity among them than is usual on a question presented, as this has been, in so many different aspects. Pordage v. Cole, 1 Wm. Saund. 320; Jones v. Gardner, 10 Johns. 266; Gazley v. Price, 16 Johns. 267; Parker v. Parmele, 20 Johns. 130; Williams v. Healey, 3 Den. 367; Johnson v. Wygant, 11 Wend. 48; Bean v. Atwater, 4 Conn. 3; Lester v. Jewett, 11 N. Y. (1 Kern. 453); Hunt v. Livermore, 5 Pick. 395; Kane v. Hood, 13 Pick. 281; 1 Pars. on Cont. 42; 2 Smith L. C. 17. . . .

It is unnecessary to consider the remaining questions, because if the plaintiff had not delivered or tendered the conveyance according to his covenant, he cannot prevail in the action.

We are of opinion that the portion of the answer setting up the contract of sale, and alleging the failure of the plaintiff to convey, or offer to convey, to the defendants the interest in the premises sold to them, is a good defense to the action, and that the order striking it out was erroneous.

Judgment reversed, and cause remanded for further proceedings.[1]

9 Cyc. 642 (52); 645 (63); 39 Cyc. 1305–1308 (37–57); W. P. 323 (8). For citation of cases on necessity of tender in equity, see Ames, Cases in equity, 342 (3).

1 "The law is firmly established in this State that in a contract for the pur-

SHEEREN *v.* MOSES *et al.*

84 ILLINOIS, 448.—1877.

SHELDON, C. J., delivered the opinion of the court.

This was a suit brought on June 10th, 1876, by the executors of the estate of Robert McCracken, deceased, against Patrick Sheeren, upon three promissory notes, under seal, made by the latter, for the sums, respectively, of $500, $500, and $1000, bearing date September 17th, 1870, payable to Robert McCracken, the first on December 10th, 1870, the second on December 10th, 1873, the third on December 10th, 1875, all with 6 per cent interest from June 10th, 1870, and 10 per cent interest after due.

The only question raised is as to the sufficiency of two pleas, to which demurrers were sustained by the court below.

One plea sets up that the notes were given as the consideration of an agreement entered into between the plaintiffs' testate, Robert McCracken, of the first part, and the defendant, Patrick Sheeren, of the second part, as follows:

"The party of the first part doth sell to the party of the second part an eighty-acre lot of land, known and described as follows—viz.: The west half of the southeast quarter of section three (3), township thirteen (13), range eleven (11) west, containing eighty (80) acres,

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chase of lands or for the sale of chattels, the covenant to convey or to deliver possession and the covenant to pay the purchase money, when concurrent in time, are dependent (Glenn v. Rossler, 156 N. Y. 161; Vandegrift v. Cowles Engineering Co., 161 N. Y. 435); and that even in case the purchase money is payable in installments, if the vendor awaits the maturity of the last installment upon the payment of which a conveyance is due, he cannot maintain an action to recover any installment without first putting the vendee in default by tendering him a deed. (Beecher v. Conradt, 13 N. Y. 108; Morange v. Morris, 3 Keyes, 48; Thomson v. Smith, 63 N. Y. 301; Eddy v. Davis, 116 N. Y. 247.)"—Ewing v. Wightman, 167 N. Y. 107.

In Dunham v. Pettee, 8 N. Y. 508, the court said: "Under the contract of sale, the delivery of the iron and the payment of the money were things to be done at one and the same time. The plaintiffs were not bound to deliver the iron unless the defendants at the same time paid the money; and the defendants were not bound to pay the price unless the plaintiffs at the same time delivered the thing sold, or was ready to deliver it. The obligations to deliver on the one part and to pay on the other, were mutual and dependent. If the buyer in a case of this sort fails to pay or offer to pay within the time specified for mutual performance, the seller is discharged from liability to answer in damages for not delivering the thing sold. But it does not follow that the seller, in such case, is entitled from the mere default of the buyer to recover the purchase-money. To entitle the seller to recover the price, he must show not only that the purchaser failed to pay, but that he himself was ready and offered to deliver the goods. 12 Johns. 209; Porter v. Rose, 20 Johns. 130."

in Scott County, and State of Illinois; and for and in consideration of said land, and a clear deed for the same, as soon as the last payments are made, the party of the second part engages to pay the party of the first part $25 per acre, in the following payments—viz.: In six months from this date, five hundred dollars ($500); five hundred dollars in three years from date, and one thousand dollars in six years from date, with interest commencing from this date, to be paid yearly on all the notes, at 6 per cent, and when the cash payment is made, the party of the first part, his heirs or assigns, shall execute a clear deed for said land, this 10th June, 1870; and the party of the second part is to pay the taxes."

(Signed by the parties.)

The plea averring the defendant, in pursuance of the agreement, had ever been ready and willing to pay the notes, but there had never been any offer or tender to him of a deed for the land described in the agreement.

The other plea alleges that the notes were given as the consideration for the purchase of the above described tract of land; that previous to the making of the notes there had been made, and at that time existed, between the defendant and Robert McCracken, an agreement in writing, setting it out as above, and that on September 17th, 1870, in pursuance of such agreement, the defendant executed the notes declared upon; that the first one was correctly drawn, but that the second and third notes were, by the scrivener, incorrectly and improperly drawn as to their times of payment, in this, that the scrivener drew the last two notes as maturing on December 10th, 1873, and on December 10th, 1875, when the same should have been written to mature as by the terms of the above agreement, and as was the intention of the parties—viz., on June 10th, 1873, and on June 10th, 1876, respectively; that the defendant, in pursuance of the agreement, had entered into the possession of said premises, but there had never been offered or tendered to him a clear deed to the land, although the defendant had always been ready and willing to pay the notes.

The notes appear, by the averments of the pleas, to have been given for the moneys due and payable by the agreement of June 10th, 1870. They were given, then, for the purchase money of land, the deed for the land to be given as we understand the agreement, upon making the last payment, which is represented by the last note. The payment of the last note, and the making of the deed, we must regard as mutual and dependent acts, and that to maintain an action upon that note there should have been a tender of a deed before bringing suit. Headley v. Shaw, 39 Ill. 354; Hunter v. Bilyeu, 39 Ill. 368; Johnson v. Wygant, 11 Wend. 48.

But it is different with the two other notes. They were to be paid before the time fixed for the conveyance of the land, and as respects

them, the agreements were independent of each other, and tender of a deed before suit was not necessary. If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act, before performance, for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent. 1 Saund. 320, note 4. The obligation of the defendant to pay the first two notes at the times stipulated, was absolute and unconditional. A cause of action accrued upon each note as soon as it became payable, and there is nothing in the agreement to defeat the right of action afterward.

By neglecting to enforce payment of the first two notes when they became due, and by waiting until the last note became due and the time for making the conveyance had elapsed, the promises to pay the first two notes, once absolute and independent, did not become mutual and dependent. This was so expressly decided in Duncan *et al.* v. Charles, 4 Scam. 561.

That was a parallel case, and decided the exact point made upon these pleas. Under its authority, the first two notes, here, are recoverable without a tender of a conveyance, and the pleas must be held bad, as respects them.

The demurrers to the pleas were, then, properly sustained, and the judgment is affirmed.

Judgment affirmed.[1]

39 Cyc. 1306 (42, 47); 1307 (52); 1308 (53); W. P. 323 (8).

[1] *Rules on conditions.*—"For the learning on this subject on the English side we are usually referred to the valuable notes of Serjeant Williams appended to his edition of Saunders' Reports and to the still more elaborate dissertation contained in Smith's Leading Cases. Saunders was Lord Chief Justice in the reign of Charles II. and his reports of the cases of Pordage v. Cole (1 Saunders, 319 l., 1669), and Peeters v. Opie (2 Saunders, 349 b, 1671), are used by Williams as pegs on which to hang a historical and critical review of the whole subject. This is continued and extended by Smith, who uses the case of Cutter v. Powell (6 T. R. 320, 1795), for a similar purpose, (Smith's L. C. 11th. ed., vol. ii., p. 1). Williams prefaces his note to Pordage v. Cole by the following statement: 'Almost all the old cases and many of the modern ones on this subject are decided upon distinctions so nice and technical that it is very difficult, if not impracticable, to deduce from them any certain rule or principle by which it can be ascertained what covenants are independent and what dependent.' (Williams' Saunders, i. 549.) The substance is always presented through the medium of form, hence the question to be answered in each case is whether or not the plaintiff must aver in his declaration that he has performed or is ready to perform all his counter obligations. If no such averment is required, the covenant is independent, and may be pursued to judgment, leaving to the defendant his separate remedy, if he has any, for the breach of another independent part of the contract. If, on the other hand, the plaintiff must

BRUSIE *v.* PECK BROS. & CO.

14 UNITED STATES APPEALS, 21.—1893.

Action at law to recover the amount of royalties alleged to be due for the manufacture of sprinklers. Judgment for defendant. Plaintiff brings error.

Plaintiff granted defendant the exclusive right to manufacture and sell a lawn sprinkler patented by plaintiff, the defendant agreeing to pay plaintiff a royalty of two dollars for each sprinkler, and not to sell them for less than fifteen dollars, except by joint agreement, and to manufacture sprinklers for plaintiff at a profit of twenty-five per

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aver performance or readiness to perform, it follows that the defendant may call upon him to prove and act upon his averment as a condition precedent. Williams, after an examination of authorities, concludes that the intention of parties is to guide us in determining whether a contract is dependent or independent. This however, only removes the difficulty a stage further back, and he therefore puts forward certain rules for ascertaining intention. One of the earliest cases cited by Williams is Thorp v. Thorp (12 Mod. 455, 1701), where Holt, C. J., delivered a lengthy and learned judgment, and laid down two rules afterwards adopted by Williams as the first two of the set propounded by him. All these rules may be serviceable in their way, though they do not go far to reconcile conflicting judgments."—Richard Brown, Law of contract in England and Scotland, 15 Juridical Review, 398.

The sets of rules on conditions, formulated by Serjeant Williams, Professor Langdell, and Professor Costigan, respectively, are published in Costigan, Performance of contracts (Chicago, 1911). Langdell's Rules, with modifications, are also given in Ashley, Contract, §§ 60–69. See also Costigan, "Conditions in contracts," 7 Col. Law Rev. 151.

In Cadwell v. Blake, 6 Gray (Mass.), 402, Shaw, C. J., said: "In construing a mutual agreement, in which there are several stipulations on both sides, the question whether one is absolute and independent, or conditional and made to depend on something first to be done on the other side, does not depend on any particular form of words, or upon any collocation of the different stipulations; but the whole instrument is to be taken together, and a careful consideration had of the various things to be done to decide correctly the order in which they are to be done."

In Loud v. Pomona Co., 153 U. S. 564, the court said: "The question whether covenants are dependent or independent must be determined in each case upon the proper construction to be placed on the language employed by the parties to express their agreement. If the language is clear and unambiguous it must be taken according to its plain meaning as expressive of the intention of the parties, and under settled principles of judicial decision should not be controlled by the supposed inconvenience or hardship that may follow such construction. If parties think proper, they may agree that the right of one to maintain an action against another shall be conditional or dependent upon the plaintiff's performance of covenants entered into on his part. On the other hand, they may agree that the performance by one shall be a condition precedent to the performance by the other. The question in each case is, which intent is disclosed by the language employed in the contract?"

cent on the cost, which plaintiff might sell in competition with defendant. Differences arising between the parties, plaintiff forbade defendant to manufacture the sprinklers and himself began to manufacture and sell them.

The court charged that if the plaintiff, without any justification arising from the previous conduct of the defendant, entered upon the market as a competitor with it in making and selling the sprinklers, he was not entitled to recover, and submitted to the jury whether plaintiff violated the contract without justification arising from defendant's non-performance.

SHIPMAN, CIRCUIT JUDGE. . . . This part of the case depends upon the question whether the respective undertakings of the two parties to the contract shall be construed to be independent, so that a breach by one party is not an excuse for a breach by the other, and either party may recover damages for the injury he has sustained, or are dependent so that a breach by one relieves the other from the duty of performance. Kingston v. Preston, Doug. 689. "Where the agreements go to the whole of the consideration on both sides, the promises are dependent, and one of them is a condition precedent to the other. If the agreements go to a part only of the consideration on both sides, and a breach may be paid for in damages, the promises are so far independent." 2 Parsons on Contracts (8th ed.), 792. By the contract which is the foundation of this suit Brusie granted to the defendant the sole and exclusive right to manufacture the patented sprinkler, and the sole right to sell, except that Brusie could sell sprinklers manufactured by the defendant, paying it twenty-five per cent profit upon the cost of such manufacture. The defendant promised to manufacture sprinklers of good material, to use its best endeavors to introduce the same, to pay a royalty of two dollars upon each machine sold, and not to sell below fifteen dollars, unless the price was changed by joint agreement. Brusie having manufactured and sold at reduced prices, calls upon the defendant to pay a royalty of two dollars upon every machine which it sold, and to recover damages for his own violation of the contract in a separate action.

The contention of the plaintiff would have weight, if Brusie's fulfillment of his part of the contract had not been vital to the ability of the defendant to fulfill any part of its contract. The plaintiff bound the defendant not to sell at a price less than fifteen dollars, unless the price should be changed by joint agreement. He thereby impliedly promised that the price imposed upon the defendant should be maintained, unless altered by joint consent. The defendant's ability to pay the royalty depended upon Brusie's abstinence from competition at reduced prices. He could not become, as he did, the defendant's active competitor, lower prices without consent, and still compel the defendant to sell at not less than fifteen dollars, and pay a royalty

of two dollars per machine. This breach by Brusie of his undertakings, when found to be unjustifiable by reason of any previous conduct of the defendant, relieved it from the obligation which it had assumed. There was no error in the charge, and the judgment of the Circuit Court is

Affirmed.[1]

9 Cyc. 642 (52); 721 (53).

NELSON *v.* PLIMPTON ELEVATING CO.

55 NEW YORK, 480.—1874.

ALLEN, J. The contract between the parties to the action was mutual, and neither could recover against the other for a breach of its terms, or put the other in default, without a tender of performance, or at least proof of a readiness and willingness to perform. An actual tender of performance may be excused when there is a willingness and an ability to perform, and actual performance has been prevented or expressly waived by the parties to whom performance is due. (Franchot v. Leach, 5 Cow. 506; Traver v. Halsted, 23 Wend. 66; Cort v. Ambergate, etc., R. Co., 17 A. & E. [N. S.] 127; Hochester v. De la Tour, 2 E. & B. 678.)

The plaintiffs agreed to furnish to the defendant, at its elevator in Buffalo, to be elevated and stored, between the dates mentioned, 500,000 bushels of grain, and to pay for the elevating and storage thereof a specified rate per bushel; and the defendant agreed to receive and store the grain, as should be required by the plaintiffs, for the stipulated compensation. The breach of the contract alleged is, that the defendant refused to receive and store grain under the agreement. It is not, however, averred in the complaint that the plaintiffs or any other person had grain for delivery to the defendant to be elevated and stored, or that the plaintiffs were ready or willing, or could have furnished or delivered grain to the defendant under the contract, and the proof on the trial did not cure the defect in the complaint. The proof was that neither the plaintiffs nor Lincoln & Co.,

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[1] *Notice to perform as condition precedent.*—"Where a party stipulates to do a certain thing in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him."—Vyse v. Wakefield, 6 M. & W. 452. So in Hutchinson v. Cummings, 156 Mass. 329, the court said: "Assuming in favor of the plaintiff, that this agreement bound the defendants to make all necessary repairs while Mrs. Dennin continued to occupy, it must be implied that they were only to make repairs upon reasonable notice."

who claimed rights under the agreement, had grain, to be elevated or stored, in Buffalo at the time of the alleged breach of the contract by the defendant, or at any time thereafter, or that they were prevented from procuring and having the grain by reason of the refusal of the defendant to receive it. . . . The plaintiffs here were not in a condition, or ready, or willing to perform the contract on their part, or furnish the grain, and the defendant at no time had the opportunity to perform on its part. The proof did not sustain the allegation of the complaint, that the defendant refused to receive and store the grain. The referee has found, in accordance with the evidence, that the defendant refused to accept or recognize an order from the plaintiffs, in favor of Lincoln & Co., to store 100,000 bushels of grain. The defendant was not required, by the terms of the contract, to accept such order or to come under any obligation other or different in form from the contract itself, and whether the reason assigned was true in fact was not material. The refusal was to do that which neither the plaintiffs nor Lincoln & Co. had a right to demand, and constituted no breach of the contract. No cause of action is averred in the complaint or was proved on the trial. . . .

The judgment must be reversed and a new trial granted. All concur. Judgment reversed.[1]

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[1] *Averment of offer or tender of performance.*—In Gray v. Smith, 83 Fed. 824, the court said: "It is contended by the plaintiff in error that the refusal of Mills to be bound by his contract, before the time for its completion had arrived, excuses the plaintiff from showing or proving that he had the ability to perform the contract upon his part. It is true that where the vendor of property, before the arrival of the time for the completion of his contract of sale or conveyance, disables himself from performing by disposing of the property to another, the purchaser may at once bring his action, and he need not aver or prove tender of the purchase money upon his part, nor his ability to carry out the contract; and where either party to a contract gives notice to the other that he will not comply with its terms, the other is excused from averring or proving a tender of performance. But, in any case of action upon a contract, the elements of the plaintiff's damage must be certain, and the facts must exist from which it may be deduced that he has suffered loss. One who makes a contract to sell property of which he has no title, nor the certain means of procuring title, presents no facts upon which damage to him may be predicated if the purchaser withdraws from the contract. . . . So far as the performance of his contract was concerned, he was in no better attitude than one who has disabled himself from carrying out a contract of sale by selling the property to another."

In Loud v. Pomona Co., 153 U. S. 564, the court said: "If the acts to be performed by the land company and the purchaser, respectively, are dependent and concurrent, neither party would be entitled to an action against the other without the averment of performance, or the tender of performance on his part. If, however, the payment of the purchase-price for the lands is a condition precedent to the land company's covenant to convey, then it is entitled to enforce payment without conveyance or tender of con-

McRAVEN *v.* CRISLER.

53 MISSISSIPPI, 542.—1876.

Action on a note for the purchase price of land. Demurrer to plea sustained.

CHALMERS, J. The suit was upon a note for $3840 given by the appellant to the appellee's intestate for the purchase money of a

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veyance, and the allegation of its readiness and willingness to convey, upon payment of the purchase money, was sufficient."

In Smith v. Lewis, 26 Conn. 119, the court said: "Some misapprehension or confusion appears to have arisen from the mode of expression used in the books in treating of the necessity of a tender or offer by the parties as applicable to the case of mutual and concurrent promises. The word 'tender,' as used in such a connection, does not mean the same kind of offer as when it is used with reference to the payment or offer to pay an ordinary debt due in money, where the money is offered to a creditor who is entitled to receive it, and nothing further remains to be done, but the transaction is completed and ended; but it only means a readiness and willingness, accompanied with an ability on the part of one of the parties, to do the acts which the agreement requires him to perform, provided the other will concurrently do the things which he is required by it to do, and a notice by the former to the latter of such readiness. Such readiness, ability, and notice are sufficient evidence of, and, indeed, constitute and imply, an offer or tender in the sense in which those terms are used in reference to the kind of agreements which we are now considering. It is not an absolute, unconditional offer to do or transfer anything at all events, but it is, in its nature, conditional only, and dependent on, and to be performed only in case of, the readiness of the other party to perform his part of the agreement."

In Vandegrift v. Cowles Engineering Co., 161 N. Y. 435, the court said: "Where, by the terms of a contract, the acts are to be concurrent, it is the duty of him who seeks to maintain an action for its breach, either by way of damages for its non-performance, or for the recovery of money paid thereon, not only to be ready and tender performance upon his part, but he must demand performance from the other party. (Ziehen v. Smith, 148 N. Y. 558; Higgins v. Eagleton, 155 N. Y. 466; Glenn v. Rossler, 156 N. Y. 161; Benjamin on Sales [7th ed.], § 592; Gazley v. Price, 16 Johns. 267.) While there are qualifications to this rule where a formal tender or demand becomes unnecessary, such as a refusal in advance to comply with the terms of the contract, or where its performance is proved to have been impossible, yet they have no application here as neither of those facts was established upon the trial."

In Cadwell v. Blake, 6 Gray (Mass.), 402, Shaw, C. J., said: "When, in the order of events, the act to be done by the one party must necessarily be done before the other can be done, it is necessarily a condition precedent, although there be a stipulation for liquidated damages for the breach on each side, and although there be a fixed future time for payment sufficiently distant to have the work done in the meantime. Suppose B. agrees to build, at his own shop, a carriage for A., of A.'s materials; A. stipulates seasonably to furnish materials, and to pay B. in four months; and each, upon failure, stipulates to pay a sum as liquidated damages. The furnishing or tendering the materials by A. is a condition precedent. Without it

tract of land. The note undertook to recite the land for the price of which it was executed, but the land was misdescribed. This being discovered by the payee some months after its execution, he took it to one Harris, who had acted as draughtsman for both parties in drawing it, and procured him to interline and alter it, so as properly to describe the land.

In suing upon the note, several counts were laid in the declaration: 1. Upon the note; 2. Upon a special contract to pay the sum agreed upon, and a delivery and retention of possession of the land thereunder; 3. The common counts for money paid out and expended, etc.

To the count upon the note there was a plea of *non est factum* under oath; and the view which we take of this count and the plea thereto renders an examination of the subsequent pleadings unnecessary, in so far as they relate to an ultimate right of recovery. We doubt whether the alteration in the description of the land was a material alteration of the note, and, if not, of course the latter was not affected by it. Bridges v. Winters, 42 Miss. 135.

But even if it be deemed a material alteration, we think it is equally clear that it did not vitiate the note. It was but the correction of a mistake so as to conform the note to the intention of both the parties to it, and it was made in such manner as clearly to negative any fraud upon the part of the payee, or any intention to obtain an advantage. That under these circumstances alterations in notes will not vitiate them, we think, is well settled. The only questions in such cases are, does the alteration actually conform to the true intention of both parties to the instrument? and was it honestly made to correct the mistake, and with no intent of procuring an advantage? Where these questions are answered in the affirmative, the law will presume or dispense with the assent of the maker of the note to its alteration. 2 Parsons on Bills and Notes, 569, 570; Chitty on Bills and Notes, 184, 185; Bayley on Bills and Notes, 90; Kershaw v. Cox, 3 Esp. 246; Knill v. Williams, 10 East, 431; Brutt v. Picard, Ry. & Mood. 37; Clute v. Small, 17 Wend. 238; Hervey v. Harvey, 15 Me. 357; Bowers v. Jewell, 2 N. H. 543; Boyd v. Brotherson, 10 Wend. 93.

The point was ruled otherwise in Miller v. Gilleland (19 Penn. St. 119) by a divided court; but we think the dissenting opinion of Justices Lowrie and Woodward (to be found in 1 Am. Law Reg.

B. cannot perform. He must build it of A.'s materials. Even building it of his own would not be a performance. B. has his shop, his tools, and his workmen all ready, but A. does not furnish the materials. If B. sues A., averring readiness to perform, he may recover. But if A. sues B. for not building the carriage, it would be a good answer that A. himself had not furnished the materials, because whatever else the contract may contain, this is in its nature a condition precedent."

672) enunciates the sounder doctrine, both upon reason and authority.

The judgment in the case at bar is therefore maintainable upon the first count in the declaration.

By the defendant's sixth plea she averred "that the original note was given by her in consideration that the plaintiff would sell and convey to her by proper deed of conveyance the land," etc.; and that no deed had been tendered before suit brought. A deed was filed with the declaration, which, by the judgment of the court, was ordered to remain on file, and be delivered on payment of the judgment. Was there any obligation to tender it before the institution of the suit? There was no written contract to convey the land, nor any proof of a parol promise to do so. The question must therefore be tested by the averments of the plea.

It will be observed that there is no allegation that the deed was to be made at or before the payment of the note, nor is any time specified when the execution of the deed was to take place. The note was payable one day after date. While it is true that the courts will hold the covenant to pay and the covenant to make title as dependent, unless a contrary intention clearly appears, it is no less true that the covenants must be regarded as independent, where the time of payment precedes the time fixed for delivering the deed, or where no time for making title is specified. Gibson v. Newman, 1 How. (Miss.) 341; Leftwich v. Coleman, 3 How. (Miss.) 167; Rector v. Price, 3 How. (Miss.) 321; Robinson v. Harbour, 42 Miss. 795.

The case of Gibson v. Newman, *supra,* was much like the one at bar. In that case, as in this, there was no written obligation to convey, and the question was determined by the language of the plea. There, as here, the plea failed to aver any period when the deed was to be made; and upon this ground the covenants were held to be independent. That case is cited and approved in Robinson v. Harbour, *ubi supra,* the latest authoritative exposition of this court on the much-vexed question of dependent and independent covenants.

The demurrer to the plea in the case at bar was properly sustained.

Judgment affirmed.

9 Cyc. 642 (52); 643 (56); 39 Cyc. 1306 (47); W. P. 854 (7).

TRACY *v.* ALBANY EXCHANGE CO.

7 NEW YORK, 472.—1852.

Action for damages for breach of a covenant to renew a lease. Judgment for plaintiff. Defendant appeals.

JEWETT, J. . . . As to the objection made by the defendant that there was rent in arrears, and therefore the plaintiff was not entitled

to a further lease, the covenant being independent, the liability of the defendant for the breach of the covenant in question remained. The payment of the rent was not a condition precedent to the right of the plaintiff to a renewal of the lease under the covenant, and he might bring his action for a breach of it, although he was guilty of a default in the payment of his rent or performance of his covenant. Dawson v. Dyer, 5 Barn. & Adol. 584. . . .

Judgment affirmed.

24 Cyc. 1002 (69–70).

TRONSON *v.* COLBY UNIVERSITY.

9 NORTH DAKOTA, 559.—1900.

Plaintiff executed and delivered to McLaughlin his non-negotiable promissory note, and secured the same by mortgage upon realty. McLaughlin, in consideration thereof, agreed to have certain claims against plaintiff, which were held by third parties, and which were liens upon the realty, satisfied of record, no time for performance being fixed. McLaughlin sold the note and assigned the mortgage to defendant, but failed to have the liens satisfied in whole or in part. Plaintiff now brings this action against defendant to have the note and mortgage cancelled. Judgment for plaintiff; defendant appeals.

Bartholomew, C. J. . . . It is apparent that the parties did not understand that the promise to pay and the promise to procure the releases of the liens were dependent promises. This may appear in a stronger light if we change parties defendant and the cause of action. Let us suppose that, after waiting a reasonable time for McLaughlin to procure the releases, plaintiff had paid the prior liens, and then brought action against McLaughlin to recover damages for the breach of his agreement to procure such releases; would it be contended that McLaughlin could defeat the action by alleging that plaintiff had not paid his note of $1,000, and that the performance of the promise to procure the releases was dependent upon the performance of plaintiff's promise to pay? And yet, if those promises were dependent, they were mutually dependent. We conclude, then, that the promise to procure the releases, and not the fulfilment of that promise, constituted the consideration of the note. See, upon this point, Chapman v. Eddy, 13 Vt. 205; Trask v. Vinson, 20 Pick. 105; Earle v. Angell, 157 Mass. 294, 32 N. E. 164; Hubon v. Park, 116 Mass. 541; Hodgkins v. Moulton, 100 Mass. 309; Turner v. Rogers, 121 Mass. 12. . . . Respondent insists that, as the time for performance upon McLaughlin's part has elapsed, no recovery could be had upon the note without pleading performance upon McLaughlin's part. We

think this is fallacious, and that the principle invoked cannot be applied to this case. No portion of plaintiff's promise to pay was ever made, by contract, dependent upon performance by McLaughlin. No time was ever fixed for performance by McLaughlin. No demand for performance was ever made upon him, so far as the record shows. He may yet perform, for aught that appears. If he fail, plaintiff has his independent right of action against him for damages. Suppose, to repeat an illustration, that plaintiff were asserting that right of action against McLaughlin now; could McLaughlin defend by alleging plaintiff's failure to pay the note for $1,000? Clearly not. Performance by McLaughlin could not be made to depend upon such payment. And if payment were overdue it could make no difference. These propositions need no support. Plaintiff cannot recover upon this record. Had plaintiff been forced to pay those prior liens, or had he voluntarily paid them, a different case might be presented. Upon that we express no opinion. The record clearly shows that nothing has been paid upon those claims. In the judgment of this court, the action should be dismissed. The district court is directed to set aside its judgment entered herein, and enter judgment dismissing the action. Reversed. All concur.[1]

9 Cyc. 642-643 (54-58); 14 H. L. R. 543.

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b. Divisible and installment contracts.

TIPTON *v.* FEITNER.

20 NEW YORK, 423.—1859.

Appeal from the Supreme Court. Action to recover the price of certain slaughtered hogs, sold by the plaintiffs to the defendant. It was defended on the ground that they were purchased under a special contract with the plaintiffs, which had been violated on their part. The case, according to the finding of the referee, before whom it was tried, was as follows: On the 3d day of February, 1855, at the city of New York, the plaintiffs agreed with the defendant, by parol, by one and the same contract, to sell the defendant eighty-eight dressed hogs, then at the slaughter-house of a third person, in the city, at 7 cents per pound; and also certain live hogs of the plain-

[1] In Howell v. James Lumber Co., 102 Ga. 595 (reported by syllabus only, the contract not being set forth), the court says: "The covenants below set forth, in a contract whereby the parties of the first part agreed to convey to the parties of the second part, for a designated period, at a specified price per acre, all the timber on certain lands for turpentine purposes, and whereby the parties of the second part agreed to convey to the other parties, at a specified price per acre, all the timber on certain other lands for sawmill purposes, were properly construed to be independent covenants."

tiffs, which were being driven, and were then on their way from the State of Ohio to New York, at 5¼ cents per pound live weight, the defendant agreeing on his part to buy the dressed and live hogs at these prices. The dressed hogs were to be delivered immediately after the sale, and the live ones on their arrival at the city, where they were expected, and did arrive some days afterward. The dressed hogs were delivered on the same day, but were not paid for by the defendant. The live hogs arrived five days afterward; they were not delivered to the defendant, but were slaughtered by the plaintiffs, and by them sold to other parties. The defendant insisted that the plaintiffs could not recover for the dressed hogs, on the ground that they had failed to perform their agreement as to the live ones. The referee, however, held that the plaintiffs were entitled to recover the price of the dressed hogs, deducting the damages which the defendant had sustained for the breach of the other branch of the contract; and he reported accordingly. The dressed hogs came to $1,182.57; deducted for defendant's damages, $401, leaving $780.38, for which judgment was given, which was affirmed at General Term. The defendant appealed.

SELDEN, J. It is said that the plaintiffs cannot recover for the dressed hogs actually delivered, because they failed to deliver the live hogs on their arrival in New York, the delivery of the latter being, as it is insisted, a condition precedent to the right of the plaintiffs to claim payment for the former. This consequence is supposed to follow, from the finding of the referee that the plaintiffs agreed to sell both live and the dressed hogs "in one and the same contract."

But it by no means follows, because a party has agreed to do several things by one and the same contract, that performance of the contract in all its parts is a condition precedent to any right to claim payment for the portion which may have been done. Were this so, there could be no such thing as "independent covenants" in any contract. It is always a question of construction, depending upon the terms of the contract, its subject matter, and the circumstances under which it was made, whether there is a condition precedent or not. There are certain well-established legal principles which seem to me decisive of this question in the present case. It is plain of itself and well settled by authority, that when by the terms of a contract a payment by one party is to precede some act to be done by the other, then the performance of the act cannot be treated as a condition of the payment; as in the case of contracts for the sale and conveyance of lands, where payments are to be made before the time fixed for the conveyance.

Again, it is equally well settled, that where, upon the sale of goods, no other time is fixed, payment is to be made when the goods are

delivered; and the vendor is under no obligation to deliver them without such payment. There is nothing in the present case which is at all indicative of an intention to give a credit to the defendant. If the contract had been to deliver articles of a perfectly homogeneous nature at different times, but at a uniform price, there might possibly be some ground for holding that the delivery of the whole was to precede any payment for the portion delivered. But even in that case, the authorities show that there must be something in the terms of the contract, from which the intention to make the delivery of the whole a condition, may be implied.

Thus, in the case of Withers v. Reynolds, 2 Barn. & Adol. 882, where the agreement was to supply the plaintiff with wheat straw of good quality, sufficient for his use as stable-keeper, and delivered on his premises, at the rate of three loads in a fortnight, up to a certain period, at the price of 33s. per load of thirty-six trusses; the plaintiff agreeing to pay for each load at that rate, it was held that the plaintiff was bound to pay for the loads as they were delivered. All the straw was to be delivered, in that case, under "one and the same contract"; and, moreover, the defendant had positively agreed by that contract, to supply the plaintiff with straw for a certain length of time—an agreement which he refused to fulfil; and yet it was held that performance in this respect was not essential to his right to claim payment for the straw actually delivered.

As the effect of a condition precedent is to prevent the court from dealing out justice to the parties according to the equities of the case, it is not surprising that we find it so frequently said that constructions productive of such conditions are not to be encouraged. Parties must be held strictly to their contracts; and where they have agreed in terms or by plain implication to a condition which is to bar them of a recovery according to what is equitable and just, they must abide by the consequences. But courts are to see that such was the intention of the parties, before they are held up to so rigid a rule.

The contract in this case, although "one and the same," is by no means indivisible. On the contrary, it consists of two distinct parts, having no necessary connection, except that they were made at the same time. Each portion of the contract is complete of itself without reference to the other. On what, then, are we to predicate an assumption, that its separate branches were intended to be dependent upon, rather than independent of each other?

The implication must be plain and unmistakable to justify such a conclusion, as its effect would be to impose upon the plaintiff a heavy penalty or forfeiture. If the time for the delivery of the live hogs had been definitely fixed, it might be more reasonable to suppose that the plaintiffs were to wait for payment for the dressed hogs until that time. But the former had not arrived; their arrival

might be delayed; they might never arrive; and yet the conclusion contended for supposes the plaintiff to have consented to give this indefinite kind of credit for a marketable article, which would have commanded the money any day at the market price.

It is urged that the referee, by finding that the whole agreement was by "one and the same contract," has virtually found that the contract was entire and indivisible, and that this finding settles the question. But whether the contract is indivisble or not, the terms of the contract being given, it is a question of law, upon which the finding of the referee is not conclusive. Such, however, is not the true construction of the finding. It evidently is not the construction put upon it by the referee himself, because he held that the plaintiffs could recover. All that is meant by the finding is, that the whole agreement, consisting of different parts, was made at one and the same time. In my view the contract was plainly divisible and the judgment of the Supreme Court should therefore be affirmed.

35 Cyc. 114 (14); 115 (21).

NORRINGTON *v.* WRIGHT *et al.*

115 UNITED STATES, 188.—1885.

Action of assumpsit. Judgment for defendants. Plaintiff brings error.

The action was on the following contract:

"Philadelphia, January 19, 1880. Sold to Messrs. Peter Wright & Sons, for account of A. Norrington & Co., London: Five thousand (5000) tons old T iron rails, for shipment from a European port or ports, at the rate of about one thousand (1000) tons per month, beginning February, 1880, but whole contract to be shipped before August 1st, 1880, at forty-five dollars ($45.00) per ton of 2240 lbs. custom-house weight, ex ship Philadelphia. Settlement cash on presentation of bills accompanied by custom-house certificate of weight. Sellers to notify buyers of shipments with vessels' names as soon as known by them. Sellers not to be compelled to replace any parcel lost after shipment. Sellers, when possible, to secure to buyers right to name discharging berth of vessels at Philadelphia.

"EDWARD J. ETTING, Metal Broker."

Plaintiff shipped under this contract 400 tons by one vessel in the last part of February, 885 tons by two vessels in March, 1571 tons by five vessels in April, 850 tons by three vessels in May, 1000 tons by two vessels in June, 300 tons by one vessel in July, and notified defendants of each shipment.

Defendants received and paid for the February shipment upon its arrival in March, but on May 14, about the time of the arrival of the March shipment, having learned of the amounts shipped in February, March, and April, gave written notice that they should decline to

receive the shipments made in March and April because they were not in accordance with the contract. On June 10, plaintiff offered defendants a delivery of exactly 1000 tons, which was declined.

At the trial, the plaintiff contended, 1st. That under the contract he had six months in which to ship the 5000 tons, and any deficiency in the earlier months could be made up subsequently, provided that the defendants could not be required to take more than 1000 tons in any one month. 2d. That, if this was not so, the contract was a divisible contract, and the remedy of the defendants for a default in any month was not by rescission of the whole contract, but only by deduction of the damages caused by the delays in the shipments on the part of the plaintiff.

But the court instructed the jury that if the defendants, at the time of accepting the delivery of the cargo paid for, had no notice of the failure of the plaintiff to ship about 1000 tons in the month of February, and immediately upon learning that fact gave notice of their intention to rescind, the verdict should be for them.

The plaintiff excepted to this instruction, and, after verdict and judgment for the defendants, sued out this writ of error.

Mr. Justice Gray. In the contracts of merchants, time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract. Behn v. Burness, 3 B. & S. 751; Bowes v. Shand, 2 App. Cas. 455; Lowber v. Bangs, 2 Wall. 728; Davison v. Von Lingen, 113 U. S. 40.

The contract sued on is a single contract for the sale and purchase of 5000 tons of iron rails, shipped from a European port or ports for Philadelphia. The subsidiary provisions as to shipping in different months, and as to paying for each shipment upon its delivery, do not split up the contract into as many contracts as there shall be shipments or deliveries of so many distinct quantities of iron. Mersey Co. v. Naylor, 9 App. Cas. 434, 439. The further provision, that the sellers shall not be compelled to replace any parcel lost after shipment, simply reduces, in the event of such a loss, the quantity to be delivered and paid for.

The times of shipment, as designated in the contract, are "at the rate of about 1000 tons per month, beginning February, 1880, but whole contract to be shipped before August 1, 1880." These words are not satisfied by shipping one-sixth part of the 5000 tons, or about

833 tons, in each of the six months which begin with February and end with July. But they require about 1000 tons to be shipped in each of the five months from February to June inclusive, and allow no more than slight and unimportant deficiences in the shipments during those months to be made up in the month of July. The contract is not one for the sale of a specific lot of goods, identified by independent circumstances, such as all those deposited in a certain warehouse, or to be shipped in a particular vessel, or that may be manufactured by the seller, or may be required for use by the buyer, in a certain mill—in which case the mention of the quantity, accompanied by the qualification of "about," or "more or less," is regarded as a mere estimate of the probable amount, as to which good faith is all that is required of the party making it. But the contract before us comes within the general rule: "When no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words 'about,' 'more or less,' and the like, in such cases, is only for the purpose of providing against accidental variations, arising from slight and unimportant excesses or deficiencies in number, measure, or weight." Brawley v. United States, 96 U. S. 168, 171, 172.

The seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity, or to require him to select part out of a greater quantity; and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract, that he would have had if it had been agreed that all the goods should be delivered at once.

The plaintiff, instead of shipping about 1000 tons in February and about 1000 tons in March, as stipulated in the contract, shipped only 400 tons in February, and 885 tons in March. His failure to fulfill the contract on his part in respect to these first two instalments justified the defendants in rescinding the whole contract, provided they distinctly and seasonably asserted the right of rescission.

The defendants, immediately after the arrival of the March shipments, and as soon as they knew that the quantities which had been shipped in February and in March were less than the contract called for, clearly and positively asserted the right to rescind, if the law entitled them to do so. Their previous acceptance of the single cargo of 400 tons shipped in February was no waiver of this right, because it took place without notice, or means of knowledge, that the stipulated quantity had not been shipped in February. The price paid by them for that cargo being above the market value, the plaintiff suffered no injury by the omission of the defendants to return the

iron; and no reliance was placed on that omission in the correspondence between the parties.

The case wholly differs from that of Lyon v. Bertram (20 How. 149), in which the buyer of a specific lot of goods accepted and used part of them with full means of previously ascertaining whether they conformed to the contract.

The plaintiff, denying the defendants' right to rescind, and asserting that the contract was still in force, was bound to show such performance on his part as entitled him to demand performance on their part, and, having failed to do so, cannot maintain this action.

For these reasons, we are of opinion that the judgment below should be affirmed. But as much of the argument at the bar was devoted to a discussion of the recent English cases, and as a diversity in the law, as administered on the two sides of the Atlantic, concerning the interpretation and effect of commercial contracts of this kind, is greatly to be deprecated, it is proper to add that upon a careful examination of the cases referred to they do not appear to us to establish any rule inconsistent with our conclusion.

In the leading case of Hoare v. Rennie (5 H. & N. 19), which was an action upon a contract of sale of 667 tons of bar iron, to be shipped from Sweden in June, July, August, and September, and in about equal portions each month, at a certain price payable on delivery, the declaration alleged that the plaintiffs performed all things necessary to entitle them to have the contract performed by the defendants, and were ready and willing to perform the contract on their part, and in June shipped a certain portion of the iron, and within a reasonable time afterwards offered to deliver to the defendants the portion so shipped, but the defendants refused to receive it, and gave notice to the plaintiffs that they would not accept the rest. The defendants pleaded that the shipment in June was of about 20 tons only, and that the plaintiffs failed to complete the shipment for that month according to the contract. Upon demurrer to the pleas, it was argued for the plaintiffs that the shipment of about one-fourth of the iron in each month was not a condition precedent, and that the defendants' only remedy for a failure to ship that quantity was by a cross action. But judgment was given for the defendants, Chief Baron Pollock saying:

"The defendants refused to accept the first shipment, because, as they say, it was not a performance, but a breach of the contract. Where parties have made an agreement for themselves, the courts ought not to make another for them. Here they say that in the events that have happened, one-fourth shall be shipped in each month, and we cannot say that they meant to accept any other quantity. At the outset, the plaintiffs failed to tender the quantity according to the contract; they tendered a much less quantity. The defendants had a right to say that this was no performance of the contract, and they were no more bound to accept the short quantity than if a single de-

livery had been contracted for. Therefore the pleas are an answer to the action." 5 H. & N. 28.

So in Coddington v. Paleologo (L. R. 2 Ex. 193), while there was a division of opinion upon the question whether a contract to supply goods "delivering on April 17, complete 8th May," bound the seller to begin delivering on April 17, all the judges agreed that if it did, and the seller made no delivery on that day, the buyer might rescind the contract.

On the other hand, in Simpson v. Crippen (L. R. 8 Q. B. 14), under a contract to supply from 6000 to 8000 tons of coal, to be taken by the buyer's wagons from the seller's colliery in equal monthly quantities for twelve months, the buyer sent wagons for only 150 tons during the first month; and it was held that this did not entitle the seller to annul the contract and decline to deliver any more coal, but that his only remedy was by an action for damages. And in Brandt v. Lawrence (1 Q. B. D. 344), in which the contract was for the purchase of 4500 quarters, ten per cent more or less, of Russian oats, "shipment by steamer or steamers during February," or, in case of ice preventing shipment, then immediately upon the opening of navigation, and 1139 quarters were shipped by one steamer in time, and 3361 quarters were shipped too late, it was held that the buyer was bound to accept the 1139 quarters, and was liable to an action by the seller for refusing to accept them.

Such being the condition of the law of England as declared in the lower courts, the case of Bowes v. Shand, after conflicting decisions in the Queen's Bench Division and the Court of Appeal, was finally determined by the House of Lords. 1 Q. B. D. 470; 2 Q. B. D. 112; 2 App. Cas. 455.

In that case, two contracts were made in London, each for the sale of 300 tons of "Madras rice, to be shipped at Madras or coast, for this port, during the months of March and, or, April, 1874, per Rajah of Cochin." The 600 tons filled 8200 bags, of which 7120 bags were put on board and bills of lading signed in February; and for the rest, consisting of 1030 bags put on board in February, and 50 in March, the bill of lading was signed in March. At the trial of an action by the seller against the buyer for refusing to accept the cargo, evidence was given that rice shipped in February would be the spring crop, and quite as good as rice shipped in March or April. Yet the House of Lords held that the action could not be maintained, because the meaning of the contract, as apparent upon its face, was that all the rice must be put on board in March and April, or in one of those months.

In the opinions there delivered the general principles underlying this class of cases are most clearly and satisfactorily stated. It will be sufficient to quote a few passages from two of those opinions.

Lord Chancellor Cairns said:

"It does not appear to me to be a question for your Lordships, or for any court, to consider whether that is a contract which bears upon the face of it some reason, some explanation, why it was made in that form, and why the stipulation is made that the shipment should be during these particular months. It is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance." 2 App. Cas. 463. "If it be admitted that the literal meaning would imply that the whole quantity must be put on board during a specified time, it is no answer to that literal meaning, it is no observation which can dispose of, or get rid of, or displace, that literal meaning, to say that it puts an additional burden on the seller, without a corresponding benefit to the purchaser; that is a matter of which the seller and the purchaser are the best judges. Nor is it any reason for saying that it would be a means by which purchasers, without any real cause, would frequently obtain an excuse for rejecting contracts when prices had dropped. The nonfulfillment of any term in any contract is a means by which a purchaser is able to get rid of the contract when prices have dropped; but that is no reason why a term which is found in a contract should not be fulfilled." pp. 465, 466. "It was suggested that even if the construction of the contract be as I have stated, still if the rice was not put on board in the particular months, that would not be a reason which would justify the appellants in having rejected the rice altogether, but that it might afford a ground for a cross action by them if they could show that any particular damage resulted to them from the rice not having been put on board in the months in question. My lords, I cannot think that there is any foundation whatever for that argument. If the construction of the contract be as I have said, that it bears that the rice is to be put on board in the months in question, that is part of the description of the subject matter of what is sold. What is sold is not 300 tons of rice in gross or in general. It is 300 tons of Madras rice to be put on board at Madras during the particular months." "The plaintiff, who sues upon that contract, has not launched his case until he has shown that he has tendered that thing which has been contracted for, and if he is unable to show that, he cannot claim damages for the nonfulfillment of the contract." pp. 467, 468.

Lord Blackburn said:

"If the description of the article tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it. I think in this case what the parties bargained for was rice, shipped at Madras or the coast of Madras. Equally good rice might have been shipped a little to the north or a little to the south of the coast of Madras. I do not quite know what the boundary is, and probably equally good rice might have been shipped in February as was shipped in March, or equally good rice might have been shipped in May as was shipped in April, and I dare say equally good rice might have been put on board another ship as that which was put on board the Rajah of Cochin. But the parties have chosen, for reasons best known to themselves, to say: We bargain to take rice, shipped in this particular region, at that particular time, on board that particular ship; and before the defendants can be compelled to take anything in fulfillment of that contract it must be shown not merely that it is equally good, but that it is the same article as they have bargained for—otherwise they are not bound to take it." 2 App. Cas. 480, 481.

Soon after that decision of the House of Lords, two cases were determined in the Court of Appeal. In Reuter v. Sala (4 C. P. D. 239), under a contract for the sale of "about twenty-five tons (more or less) black pepper, October and, or, November shipment, from Penang to London, the name of the vessel or vessels, marks and full particulars to be declared to the buyer in writing within sixty days from the date of bill of lading," the seller, within the sixty days, declared twenty-five tons by a particular vessel, of which only twenty tons were shipped in November, and five tons in December; and it was held that the buyer had the right to refuse to receive any part of the pepper. In Honck v. Muller (7 Q. B. D. 92), under a contract for the sale of 2000 tons of pig iron, to be delivered to the buyer free on board at the maker's wharf "in November, or equally over November, December, and January next," the buyer failed to take any iron in November, but demanded delivery of one-third in December and one-third in January; and it was held that the seller was justified in refusing to deliver, and in giving notice to the buyer that he considered the contract as canceled by the buyer's not taking any iron in November.

The plaintiff in the case at bar greatly relied on the very recent decision of the House of Lords in Mersey Co. v. Naylor (9 App. Cas. 434), affirming the judgment of the Court of Appeal in 9 Q. B. D. 648, and following the decision of the Court of Common Pleas in Freeth v. Burr, L. R. 9 C. P. 208.

But the point there decided was that the failure of the buyer to pay for the first instalment of the goods upon delivery does not, unless the circumstances evince an intention on his part to be no longer bound by the contract, entitle the seller to rescind the contract and to decline to make further deliveries under it. And the grounds of the decision, as stated by Lord Chancellor Selborne in moving judgment in the House of Lords, are applicable only to the case of a failure of the buyer to pay for, and not to that of a failure of the seller to deliver, the first instalment.

The Lord Chancellor said:

"The contract is for the purchase of 5000 tons of steel blooms of the company's manufacture; therefore it is one contract for the purchase of that quantity of steel blooms. No doubt there are subsidiary terms in the contract, as to the time of delivery, 'Delivery 1000 tons monthly commencing January next'; and as to the time of payment, 'Payment net cash within three days after receipt of shipping documents'; but that does not split up the contract into as many contracts as there shall be deliveries for the purpose, of so many distinct quantities of iron. It is quite consistent with the natural meaning of the contract, that it is to be one contract for the purchase of that quantity of iron to be delivered at those times and in that manner, and for which payment is so to be made. It is perfectly clear that no particular payment can be a condition precedent of the entire contract, because the delivery under the contract was most certainly to precede payment; and that

being so, I do not see how, without express words, it can possibly be made a condition precedent to the subsequent fulfillment of the unfulfilled part of the contract, by the delivery of the undelivered steel." 9 App. Cas. 439.

Moreover, although in the Court of Appeal *dicta* were uttered tending to approve the decision in Simpson v. Crippin, and to disparage the decisions in Hoare v. Rennie and Honck v. Muller, above cited, yet in the House of Lords Simpson v. Crippin was not even referred to, and Lord Blackburn, who had given the leading opinion in that case, as well as Lord Bramwell, who had delivered the leading opinion in Honck v. Muller, distinguished Hoare v. Rennie and Honck v. Muller from the case in judgment. 9 App. Cas. 444, 446.

Upon a review of the English decisions, the rule laid down in the earlier cases of Hoare v. Rennie and Coddington v. Paleologo, as well as in the later cases of Reuter v. Sala and Honck v. Muller, appears to us to be supported by a greater weight of authority than the rule stated in the intermediate cases of Simpson v. Crippen and Brandt v. Lawrence, and to accord better with the general principles affirmed by the House of Lords in Bowes v. Shand, while it in nowise contravenes the decision of that tribunal in Mersey Co. v. Naylor.

In this country there is less judicial authority upon the question. The two cases most nearly in point that have come to our notice are Hill v. Blake (97 N. Y. 216), which accords with Bowes v. Shand, and King Philip Mills v. Slater (12 R. I. 82), which approves and follows Hoare v. Rennie. The recent cases in the Supreme Court of Pennsylvania, cited at the bar, support no other conclusion. In Shinn v. Bodine (60 Penn. St. 182) the point decided was that a contract for the purchase of 800 tons of coal at a certain price per ton, "coal to be delivered on board vessels as sent for during months of August and September," was an entire contract, under which nothing was payable until delivery of the whole, and therefore the seller had no right to rescind the contract upon a refusal to pay for one cargo before that time. In Morgan v. McKee (77 Penn. St. 228) and in Scott v. Kittanning Coal Co. (89 Penn. St. 231) the buyer's right to rescind the whole contract upon the failure of the seller to deliver one instalment was denied, only because that right had been waived, in the one case by unreasonable delay in asserting it, and in the other by having accepted, paid for, and used a previous instalment of the goods. The decision of the Supreme Judicial Court of Massachusetts in Winchester v. Newton (2 Allen, 492) resembles that of the House of Lords in Mersey Co. v. Naylor.

Being of opinion that the plaintiff's failure to make such shipments in February and March as the contract required prevents his maintaining this action, it is needless to dwell upon the further objection that the shipments in April did not comply with the contract, because the defendants could not be compelled to take about

1000 tons out of the larger quantity shipped in that month, and the plaintiff, after once designating the names of vessels, as the contract bound him to do, could not substitute other vessels. See Busk v. Spence, 4 Camp. 329; Graves v. Legg, 9 Exch. 709; Reuter v. Sala, above cited.

Judgment affirmed.[1]

9 Cyc. 648–649 (91–96); 35 Cyc. 117–118 (37–43); W. P. 331 (11); 629 (91); 9 H. L. R. 148; 14 H. L. R. 537; 1 C. L. R. 317; 12 C. L. R. 167. Woodward, Doctrine of divisible contracts, 39 Amer. Law Register (N. S.) 1.

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c. Failure to perform a vital term, or condition, and failure to perform a non-vital or subsidiary term.

DAVISON *v.* VON LINGEN.

113 UNITED STATES, 40.—1885.

[Reported herein at p. 302.]

POPE *et al. v.* ALLIS.

115 UNITED STATES, 363.—1885.

Action to recover back money paid for iron which, on arrival, was rejected. Judgment for plaintiff (defendant in error).

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[1] Where the vendor of goods to be delivered and paid for in installments, refuses to deliver an installment, a breach of the entire contract is thereby established for which the vendee if he so elects may immediately recover all his damages; or he may wait until the expiration of the time for the delivery of all the goods and then recover; he cannot however, split up his demand and maintain successive actions to recover for each default as it occurs; and when he obtains a judgment for damages for the non-delivery of part of the goods, it is a bar to the maintenance of a subsequent action to recover for the failure to deliver the balance.—Pakas v. Hollingshead, 184 N. Y. 211 (Syllabus). See 6 C. L. Rev. 584; 18 H. L. R. 619.

In Gerli v. Poidebard Silk Co., 57 N. J. L. 432, the court said: "On this question this court adopted the general rule that when the seller has agreed to deliver the goods sold in installments, and the buyer has agreed to pay the price in installments which are proportioned to and payable on the delivery of each installment of goods, then default by either party with reference to any one installment will not ordinarily entitle the other party to abrogate the contract. We were led to the adoption of this rule because it seemed to be supported by the greater strength of judicial authority, and to be most likely to promote justice. We see no sufficient reason for abandoning it. The rule governs the case in hand, and maintains the right of the plaintiff to recover damages for the defendant's refusal to accept the third installment of silk."

Failure to pay an installment.—For comment and cases upon the conflict as to whether failure to pay an installment discharges the other party, see W. P. 331–332 (11); 1 C. L. R. 317; 6 Mich. L. R. 80.

Plaintiff bought of defendants by description a quantity of "No. 1 extra pig iron" to be shipped from Coplay, Penn. On arrival plaintiff rejected the iron because it did not answer the description.

MR. JUSTICE WOODS. . . . The assignment of error mainly relied on by the plaintiffs in error is that the court refused to instruct the jury to return a verdict for the defendants. The legal proposition upon which their counsel based this request was that the purchaser of personal property, upon breach of warranty of quality, cannot, in the absence of fraud, rescind the contract of purchase and sale, and sue for the recovery of the price. And they contended that, as the iron was delivered to defendant in error either at Coplay or Elizabethport, and the sale was completed thereby, the only remedy of the defendant in error was by a suit upon the warranty. It did not appear that at the date of the contract the iron had been manufactured, and it was shown by the record that no particular iron was segregated and appropriated to the contract by the plaintiffs in error until a short time before its shipment, in the latter part of April and the early part of May. The defendant in error had no opportunity to inspect it until it arrived in Milwaukee, and consequently never accepted the particular iron appropriated to fill the contract. It was established by the verdict of the jury that the iron shipped was not of the quality required by the contract. Under these circumstances the contention of the plaintiffs in error is that the defendant in error, although the iron shipped to him was not what he bought, and could not be used in his business, was bound to keep it, and could only recover the difference in value between the iron for which he contracted and the iron which was delivered to him.

We do not think that such is the law. When the subject matter of a sale is not in existence, or not ascertained at the time of the contract, an undertaking that it shall, when existing or ascertained, possess certain qualities, is not a mere warranty, but a condition, the performance of which is precedent to any obligation upon the vendee under the contract; because the existence of those qualities being part of the description of the thing sold becomes essential to its identity, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted. Chanter v. Hopkins, 4 Mees. & W. 399; Barr v. Gibson, 3 Mees. & W. 390; Gompertz v. Bartlett, 2 El. & Bl. 849; Okell v. Smith, 1 Stark, N. P. 107; notes to Cutter v. Powell, 2 Smith's Lead Cas. (7th Am. ed.) 37; Woodle v. Whitney, 23 Wis. 55; Boothby v. Scales, 27 Wis. 626; Fairfield v. Madison Manuf'g Co., 38 Wis. 346. See also Nichol v. Godts, 10 Exch. 191. So, in a recent case decided by this court, it was said by Mr. Justice Gray: "A statement" in a mercantile contract "descriptive of the subject matter or of some material

incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty in the sense in which that term is used in insurance and maritime law; that is to say, a condition precedent upon the failure or non-performance of which the party aggrieved may repudiate the whole contract." Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. Rep. 12. See also Filley v. Pope, 115 U. S. 213, 6 Sup. Ct. Rep. 19. And so, when a contract for the sale of goods is made by sample, it amounts to an undertaking on the part of the seller with the buyer that all the goods are similar, both in nature and quality, to those exhibited, and if they do not correspond the buyer may refuse to receive them; or, if received, he may return them in a reasonable time allowed for examination, and thus rescind the contract. Lorymer v. Smith, 1 Barn. & C. 1; Magee v. Billingsley, 3 Ala. 679.

The authorities cited sustain this proposition: that when a vendor sells goods of a specified quality, but not in existence or ascertained, and undertakes to ship them to a distant buyer, when made or ascertained, and delivers them to the carrier for the purchaser, the latter is not bound to accept them without examination. The mere delivery of the goods by the vendor to the carrier does not necessarily bind the vendee to accept them. On their arrival he has the right to inspect them to ascertain whether they conform to the contract, and the right to inspect implies the right to reject them if they are not of the quality required by the contract. The rulings of the Circuit Court were in accordance with these views.

We have been referred by the plaintiffs in error to the cases of Thornton v. Wynn (12 Wheat. 184) and Lyon v. Bertram (20 How. 149) to sustain the proposition that the defendant in error in this case could not rescind the contract and sue to recover back the price of the iron. But the cases are not in point. In the first, there was an absolute sale with warranty and delivery to the vendee of a specific chattel, namely, a race-horse; in the second, the sale was of a specified and designated lot of flour which the vendee had accepted, and part of which he had used, with ample means to ascertain whether or not it conformed to the contract.

The cases we have cited are conclusive against the contention of the plaintiffs in error. The jury has found that the iron was not of the quality which the contract required, and on that ground the defendant in error, at the first opportunity, rejected it, as he had a right to do. His suit to recover the price was, therefore, well brought.

Other errors are assigned, but, in our opinion, they present no ground for the reversal of the judgment, and do not require discussion.

Judgment affirmed.

35 Cyc. 138 (43); 404 (49); W. P. 653 (3).

WOLCOTT *et al. v.* MOUNT.

36 NEW JERSEY LAW, 262.—1873.

Action for breach of warranty. Judgment for plaintiff. Defendants appeal.

Plaintiff purchased of defendants, who were retail merchants, a quantity of seed represented and believed by defendants to be early strap-leaf red-top turnip seed, plaintiff informing defendants that he wanted seed of that variety to raise a crop for the early New York market. In fact the seed was of a late variety, fit only for cattle, and plaintiff lost his entire crop. The difference between the two kinds of seed cannot be discovered by inspection.

DEPUE, J. The action in this case was brought on a contract of warranty and resulted in a judgment against the defendants in the action for damages.

Two exceptions to the proceedings are presented by the brief submitted. The first touches the right of the plaintiff to recover at all. The second, the measure of damages.

I.

In the absence of fraud or a warranty of the quality of an article, the maxim, *caveat emptor,* applies. As a general rule, no warranty of the goodness of an article will be implied on a contract of sale.

It has been held by the courts of New York, that no warranty whatever would arise from a description of the article sold. Seixas v. Woods, 2 Caines, 48; Snell v. Moses, 1 Johns, 96; Swett v. Colgate, 20 Johns. 196. In these cases the defect was not in the quality, but the article delivered was not of the species described in the contract of sale.

In the well-known case of Chandelor v. Lopus (Cro. Jac. 4) it was decided that a bare affirmation that a stone sold was a bezoar stone, when it was not, was no cause of action.

The cases cited fairly present the negative of the proposition on which the plaintiff's right of action depends. Chandelor v. Lopus was decided on the distinction between actions on the case *in tort* for a misrepresentation, in which a scienter must be averred and proved and actions upon the contract of warranty. 1 Smith's Lead. Cas. 283. Chancellor Kent, who delivered the opinion in Seixas v. Woods, in his Commentaries, expresses a doubt whether the maxim, *caveat emptor,* was correctly applied in that case, inasmuch as there was a description in writing of the articles sold, from which a warranty might have been inferred. 2 Kent, 479. And in a recent case before the Commission of Appeals of New York, Earl, C., declared that Seixas v. Woods had been much questioned and could no longer be

regarded as authority on the precise point. Hawkins v. Pemberton, 51 N. Y. 204. In the later English cases some criticism has been made upon the application of the term "warranty" to representations in contracts of sale, descriptive of articles which are known in the market by such descriptions, per Lord Abinger in Chanter v. Hopkins, 4 M. & W. 404; per Erle, C. J., in Bannerman v. White, 10 C. B. (N. S.) 844. But in a number of instances it has been held that statements descriptive of the subject matter, if intended as a substantive part of the contract, will be regarded in the first instance as conditions, on the failure of which the other party may repudiate *in toto,* by a refusal to accept or a return of the article, if that be practicable, or if part of the consideration has been received, and rescission therefore has become impossible, such representations change their character as conditions and become warranties, for the breach of which an action will lie to recover damages. The rule of law is thus stated by Williams, J., in Behn v. Burness, as established on principle and sustained by authority. 3 B. & S. 755.

In Bridge v. Wain (1 Starkie, 504) no special warranty was proved, but the goods were described as scarlet cuttings, an article known in the market as peculiar to the China trade. In an action for breach of warranty, Lord Ellenborough held that if the goods were sold by the name of scarlet cuttings, and were so described in the invoice, an undertaking that they were such must be inferred. In Allan v. Lake (18 Q. B. 560) the defendant sold to the plaintiff a crop of turnips, described in the note sold as Skirving's Sweedes. The seed having been sown, it turned out that the greater part was not of that kind, but of an inferior kind. It was held that the statement that the seeds were Skirving's Sweedes, was a description of a known article of trade and a warranty. In Josling v. Kingsford (13 C. B. N. S. 447) the purchaser recovered damages upon a contract for the sale of oxalic acid, where the jury found that the article delivered did not, in a commercial sense, come properly within the description of oxalic acid, though the vendor was not the manufacturer, and the vendee had an opportunity of inspection (the defect not being discoverable by inspection), and no fraud was suggested. In Wieler v. Schilizzi (17 C. B. 619) the sale was of "Calcutta linseed." The goods had been delivered, and the action was in form on the warranty implied from the description. The jury having found that the article delivered had lost its distinctive character as Calcutta linseed, by reason of the admixture of foreign substance, the plaintiff recovered his damages upon the warranty.

The doctrine that on the sale of a chattel as being of a particular kind or description, a contract is implied that the article sold is of that kind or description, is also sustained by the following English cases: Powell v. Horton, 2 Bing. N. C. 668; Barr v. Gibson, 3 M.

& W. 390; Chanter v. Hopkins, 4 M. & W. 399; Nichol v. Godts, 10 Exch. 191; Gompertz v. Bartlett, 2 E. & B. 849; Azemar v. Casella, Law Rep. 2 C. P. 431, 677; and has been approved by some decisions in the courts of this country. Henshaw v. Robins, 9 Metc. 83; Borrekins v. Bevan, 3 Rawle, 23; Osgood v. Lewis, 2 Harr. & Gill. 495; Hawkins v. Pemberton, 51 N. Y. 198.

The right to repudiate the purchase for the non-conformity of the article delivered, to the description under which it was sold, is universally conceded. That right is founded on the engagement of the vendor, by such description, that the article delivered shall correspond with the description. The obligation rests upon the contract. Substantially, the description is warranted. It will comport with sound legal principles to treat such engagements as conditions in order to afford the purchaser a more enlarged remedy, by rescission, than he would have on a simple warranty; but when his situation has been changed, and the remedy, by repudiation has become impossible, no reason supported by principle can be adduced, why he should not have upon his contract such redress as is practicable under the circumstances. In that situation of affairs, the only available means of redress is by an action for damages. Whether the action shall be technically considered an action on a warranty, or an action for the non-performance of a contract, is entirely immaterial.

The contract which arises from the description of an article on a sale by a dealer not being the manufacturer is not in all respects coextensive with that which is sometimes implied where the vendor is the manufacturer, and the goods are ordered by a particular description, or for a specified purpose, without opportunity for inspection, in which case a warranty, under some circumstances, is implied that the goods shall be merchantable, or reasonably fit for the purpose for which they were ordered. In general, the only contract which arises on the sale of an article by a description, by its known designation in the market, is that it is of the kind specified. If the article corresponds with that description, no warranty is implied that it shall answer the particular purpose in view of which the purchase was made. Chanter v. Hopkins, 4 M. & W. 404; Ollivant v. Bayley, 5 Q. B. 288; Winsor v. Lombard, 18 Pick. 57; Mixer v. Coburn, 11 Metc. 559; Gossler v. Eagle &c. Co. 103 Mass. 331. The cases on this subject, so productive of judicial discussion, are classified by Justice Mellor, in Jones v. Just, Law Rep. 3 Q. B. 197. Nor can any distinction be maintained between statements of this character in written and in oral contracts. The arguments founded on an apprehension that where the contract is oral, loose expressions of judgment or opinion pending the negotiations might be regarded as embodied in the contract, contrary to the intentions of the parties, is without reasonable foundation. It is always a question of construc-

tion or of a fact, whether such statements were the expression of a mere matter of opinion, or were intended to be a substantive part of the contract, when concluded. If the contract is in writing, the question is one of construction for the court. Behn v. Burness, 3 B. & S. 751. If it be concluded by parol, it will be for the determination of the jury, from the nature of the sale, and the circumstances of each particular case, whether the language used was an expression of opinion, merely leaving the buyer to exercise his own judgment, or whether it was intended and understood to be an undertaking which was a contract on the part of the seller. Lomi v. Tucker, 4 C. & P. 15; De Sewhanberg v. Buchanan, 5 C. & P. 343; Power v. Barham, 4 A. & E. 473. In the case last cited, the vendor sold by a bill on parcels, "four pictures, views in Venice—Canaletto"; it was held that it was for the jury to say, under all the circumstances, what was the effect of the words, and whether they implied a warranty of genuineness, or conveyed only a description or an expression of opinion, and that the bill of parcels was properly laid before the jury with the rest of the evidence.

The purchaser may contract for a specific article, as well as for a particular quality, and if the seller makes such a contract, he is bound by it. The state of the case presented shows that the plaintiff inquired for seed of a designated kind, and informed the defendants that he wanted it to raise a crop for the New York market. The defendants showed him the seed, and told him it was the kind he inquired for, and sold it to him as such. The inspection and examination of the seed were of no service to the plaintiff. The facts and circumstances attending the transaction were before the court below, and from the evidence, it decided that the proof was sufficient to establish a contract of warranty. The evidence tended to support that conclusion, and this court cannot, on *certiorari,* review the finding of the court below, on a question of fact, where there is evidence from which the conclusion arrived at may be lawfully inferred.

II.

The second reason for reversal is, that the court was in error in the damages awarded. The judgment was for consequential damages.

The contention of the defendants' counsel was that the damages recoverable should have been limited to the price paid for the seed, and that all damages beyond restitution of the consideration were too speculative and remote to come within the rules for measuring damages. As the market price of the seed which the plaintiff got, and had the benefit of in a crop, though of an inferior quality, was probably the same as the market price of the seed ordered, the defendants' rule of damages would leave the plaintiff remediless.

The earlier cases, both in English and American courts, gen-

erally concurred in excluding, as well in actions in tort as in actions on contracts, from the damages recoverable, profits which might have been realized if the injury had not been done, or the contract had been performed. Sedg. on Dam. 69.

This abridgment of the power of courts to award compensation adequate to the injury suffered has been removed in actions of tort. The wrong-doer must answer in damages for those results injurious to other parties, which are presumed to have been within his contemplation when the wrong was done. Crater v. Binninger, 4 Vroom, 513. Thus, in an action to recover damages for personal injuries caused by the negligence of the defendant, the plaintiff was held to be entitled to recover as damages the loss he sustained in his profession as an architect, by reason of his being incapacitated from pursuing his business. New Jersey Express Co. v. Nichols, 4 Vroom, 435.

A similar relaxation of this restrictive rule has been made, at least to a qualified extent, in action on contracts, and loss of profits resulting naturally from the breach of the contract, has been allowed to enter into the damages recoverable where the profits that might have been realized from the performance of the contract are capable of being estimated with a reasonable degree of certainty. In an action on a warranty of goods adapted to the China market, and purchased with a view to that trade, the purchaser was allowed damages with reference to their value in China, as representing the benefit he would have received from the contract, if the defendant had performed it. Bridge v. Wain, 1 Starkie, 504. On an executory contract put an end to by the refusal of the one party to complete it, for such a breach the other party may recover such profits as would have accrued to him as the direct and immediate result of the performance of the contract. Fox v. Harding, 7 Cush. 516; Masterton v. Mayor of Brooklyn, 7 Hill, 61. In an action against the charterer of a vessel for not loading a cargo, the freight she would have earned under the charter party, less expenses and the freight actually received for services during the period over which the charter extended, was held to be the proper measure of damages. Smith v. McGuire, 3 H. & N. 554.

In the cases of the class from which these citations have been made, and they are quite numerous, the damages arising from loss of profits were such as resulted directly from non-performance, and in the ordinary course of business would be expected as a necessary consequence of the breach of the contract. In the two cases cited, of Fox v. Harding and Masterton v. Mayor of Brooklyn, it was said that the profits that might have been realized from independent and collateral engagements, entered into on the faith of the principal contract, were too remote to be taken into consideration. This latter qualification would exclude compensation for the loss of the profits of a resale by the vendee of the goods purchased, made upon the faith of

his expectation, that his contract with his vendor would be performed.

In the much canvassed case of Hadley v. Baxendale (9 Exch. 341), Alderson, B., in pronouncing the judgment of the court, enunciated certain principles on which damages should be awarded for breaches of contracts which assimilated damages in actions on contract to actions in tort. The rule there adopted as resting on the foundation of correct legal principles was, that the damages recoverable for a breach of contract were either such as might be considered as arising naturally, *i. e.* according to the usual course of things, from the breach of the contract itself; or such as might reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable results of the breach of it; and that when the contract is made under special circumstances, if those special circumstances are communicated, the amount of injury which would ordinarily follow from a breach of the contract, under such circumstances, may be recovered as damages that would reasonably be expected to result from such breach. The latter branch of this rule was considered by Blackburn, J., and Martin, B., as analogous to an agreement to bear the loss resulting from the exceptional state of things, made part of the principal contract, by the fact that such special circumstances were communicated, with reference to which the parties may be said to have contracted. Horne v. The Midland Railway Company, Law Rep. 8 C. P. 134–140. Under the operation of this rule, damages arising from the loss of a profitable sale, or the deprivation for a contemplated use, have been allowed when special circumstances of such sale or proposed use were communicated contemporaneously with the making of the contract; and have been denied when such communication was not made so specially, as that the other party was made aware of the consequences that would follow from his non-performance. Borries v. Hutchinson, 18 C. B. (N. S.) 445; Cory v. Thames Ironworks Co., Law Rep. 3 Q. B. 181; Horne v. The Midland Railway Company, L. R. 8 C. P. 134; Benjamin on Sales, 665–671.

It must not be supposed that under the principle of Hadley v. Baxendale mere speculative profits, such as might be conjectured to have been the probable results of an adventure which was defeated by the breach of the contract sued on, the gains from which are entirely conjectural, with respect to which no means exist of ascertaining, even approximately, the probable results, can, under any circumstances, be brought within the range of damages recoverable. The cardinal principle in relation to the damages to be compensated for on the breach of a contract, that the plaintiff must establish the quantum of his loss, by evidence from which the jury will be able to estimate the extent of his injury, will exclude all such elements of in-

jury as are incapable of being ascertained by the usual rules of evidence to a reasonable degree of certainty.

For instance, profits expected to be made from a whaling voyage, the gains from which depend in a great measure upon chance, are too purely conjectural to be capable of entering into compensation for the non-performance of a contract, by reason of which the adventure was defeated.[1] For a similar reason, the loss of the value of a crop for which the seed had not been sown, the yield from which, if planted, would depend upon the contingencies of weather and season, would be excluded as incapable of estimation, with that degree of certainty which the law exacts in the proof of damages. But if the vessel is under charter, or engaged in a trade, the earnings of which can be ascertained by reference to the usual schedule of freights in the market, or if a crop has been sowed on the ground prepared for cultivation, and the plaintiff's complaint is, that because of the inferior quality of the seed a crop of less value is produced, by these circumstances the means would be furnished to enable the jury to make a proper estimation of the injury resulting from the loss of profits of this character.

In this case the defendants had express notice of the intended use of the seed. Indeed, the fact of the sale of seeds by a dealer keeping them for sale for gardening purposes, to a purchaser engaged in that business, would of itself imply knowledge of the use which was intended, sufficient to amount to notice. The ground was prepared and sowed, and a crop produced. The uncertainty of the quantity of the crop, dependent upon the condition of weather and season, was removed by the yield of the ground under the precise circumstances to which the seed ordered would have been exposed. The difference between the market value of the crop raised, and the same crop from the seed ordered, would be the correct criterion of the extent of the loss. Compensation on that basis may be recovered in damages for the injury sustained as the natural consequence of the

[1] In Dennis v. Maxfield, 10 Allen (Mass.), 138, an action on contract was brought by the master against the owner of a ship, to recover damages for breach of a contract of employment, for a "whaling voyage of five years' duration" from the sailing of the ship from New Bedford. The master was to have a certain "lay" on the proceeds, and other compensation depending on the amount of cargo. The service began May 17, 1858 and continued until Nov. 20, 1860, when he was removed at the Sandwich Islands. The court held that he was entitled to recover the wages which he had earned previous to his removal, as well as those which he was prevented from earning by his wrongful discharge. As to the latter the court said: "They are undoubtedly in their nature contingent and speculative and difficult of estimation; but, being made by express agreement of the parties of the essence of the contract, we do not see how they can be excluded in ascertaining the compensation to which the plaintiff is entitled."

breach of the contract. Randall v. Raper, E. B. & E. 84; Lovegrove v. Fisher, 2 F. & F. 128.

From the state of the case, it must be presumed that the court below adopted this rule as the measure of damages, and the judgment should be affirmed.

35 Cyc. 430–432 (34–37); W. P. 653 (3); 654 (5)

FREYMAN *v.* KNECHT.

78 PENNSYLVANIA STATE, 141.—1875.

Action on the case. Verdict for plaintiff. Defendant brings error.

Defendant sold plaintiff a horse and warranted it sound. It turned out that the horse had one blind eye and the other was affected. Plaintiff took the horse to defendant's house and left it there, but defendant refused to receive it, and it was sold as an estray. The plaintiff was allowed to recover as damages the purchase price with interest.

Mr. Justice Williams. It was clearly competent for the plaintiff to prove that, when he purchased the mare in November, 1872, her eyes were diseased; and in order to show that the disease was not temporary but permanent and incurable, that it continued until November, 1873, when one of her eyes became wholly blind and the sight of the other was greatly impaired. But evidence as to the condition of her eyes in November, 1873, was not admissible *per se* for the purpose of showing that they were diseased at the time of the sale; and it should not have been received if there was no evidence tending to show what their condition was during the ten months immediately preceding that date. If the defendant was guilty of fraud in the sale and warranty of the mare, the plaintiff had the right to rescind the contract, and upon returning or offering to return her, to recover back the price paid in an action on the case for deceit, or in an action of assumpsit or case for the fraudulent warranty. 1 Chit. Pl. 137. But if there was no fraud or deceit in the sale, the plaintiff had no right to rescind the contract for the alleged breach of warranty, and to return the mare without the defendant's consent. Kase v. John, 10 Watts, 107; Sedgwick on Damages, 286–7. It is true that he might sue either in assumpsit or case for the breach of the warranty (Vanleer v. Earle, 2 Casey, 277); but the measure of his damages would be, not the consideration or price paid, but the difference between the actual value of the mare, and her value, if sound, with interest from the date of the sale. Where there is no fraud or agreement to return, the vendee cannot rescind the contract after it has been executed, but his only remedy is an action on the warranty.

In this case it is not alleged that the defendant was guilty of any fraud or deceit in the sale and warranty of the mare, nor is there any evidence that he knew or had any reason to believe that her eyes were permanently and incurably diseased at the time of the sale. The plaintiff, therefore, had no right to return the mare, and the defendant was not bound to take her back and refund the price. It follows that there was error in overruling the defendant's offer to show that he refused to accept the mare when she was returned by the plaintiff, and that soon afterwards she was sold as a stray for about the same price the plaintiff paid for her; and for not charging, as requested in defendant's fourth point, that the horse, or the value thereof, is to be considered as the property of the plaintiff. The defendant had the right to show the price for which the mare was sold, as a stray, by the constable, as evidence of her value at the time of the sale to the plaintiff; and he was entitled to the instruction prayed for, in order to limit the plaintiff's recovery to the difference between the actual value of the mare, and her value, if sound, as warranted, with interest thereon from the date of her sale. The other assignments of error are not sustained, but for the reasons given the judgment must be reversed.

Judgment reversed, and a *venire facias de novo* awarded.[1]

35 Cyc. 434 (55); W. P. 607 (67).

BRYANT *v.* ISBURGH.

13 GRAY, (MASS.), 607.—1859.

Action of contract to recover the price of a horse sold and delivered to the defendant by the plaintiff. Answer, that the plaintiff warranted the horse to be sound at the time of the sale; that the horse proved to be unsound, and was returned to the plaintiff. The plaintiff did not receive the horse back, but declined to do so. Verdict for plaintiff, with deduction for damages.

The court charged that the defendant had no right to return the horse and rescind the contract, in the absence of fraud, unless such a remedy was provided for by the terms of the contract. Defendant excepted to this charge.

METCALF, J. The precise question in this case is, whether a purchaser of personal property, sold to him with an express warranty, and taken into possession by him, can rescind the contract and return the property, for breach of the warranty, when there is no fraud, and no express agreement that he may do so. It appears from the cases cited for the plaintiff that in the English courts, and in some

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1 The rule in New York was formerly in accord, but now, by § 150 of the New York Sales Act, the right of rescission is given. (§ 69, American Uniform Sales Act.)

of the courts in this country, he cannot, and that his only remedy is on the warranty. See also 2 Steph. N. P. 1296; Addison on Con. (2d Am. ed.) 272; Oliphant's Law of Horses, 88; Cripps v. Smith, 3 Irish Law R. 277.

But we are of opinion (notwithstanding a *dictum* of Parsons, C. J., in Kimball v. Cunningham, 4 Mass. 505) that, by the law of this commonwealth, as understood and practiced upon for more than forty years, there is no such difference between the effect of an implied and an express warranty as deprives a purchaser of any legal right of rescission under the latter which he has under the former; and that he to whom property is sold with express warranty, as well as he to whom it is sold with an implied warranty, may rescind the contract for breach of warranty, by a seasonable return of the property, and thus entitle himself to a full defense to a suit brought against him for the price of the property, or to an action against the seller to recover back the price, if it has been paid to him. In Bradford v. Manly (13 Mass. 139), where it was decided that a sale by sample was tantamount to an express warranty that the sample was a true representative of the kind of thing sold (and in which case there was no fraud). Chief Justice Parker said: "If a different thing is delivered, he" (the seller) "does not perform his contract, and must pay the difference, or receive the thing back and rescind the bargain, if it is offered him." This, it is true, was only a *dictum,* and not to be regarded as a decisive authority. But in Perley v. Balch (23 Pick. 283), which was an action on a promissory note given for the price of an ox sold to the defendant, it was adjudged that the jury were rightly instructed that if, on the sale of the ox, there was fraud, *or an express warranty and a breach of it,* the defendant might avoid the contract by returning the ox within a reasonable time, and that this would be a defense to the action. In Dorr v. Fisher (1 Cush. 274) it was said by Shaw, C. J., that, "to avoid circuity of action, a warranty may be treated as a condition subsequent, at the election of the vendee, who may, upon a breach thereof, rescind the contract and recover back the amount of his purchase money, as in case of fraud. But if he does this, he must first return the property sold, or do everything in his power requisite to a complete restoration of the property to the vendor; and without this he cannot recover." The chief justice took no distinction between an express warranty and an implied one, but referred, in support of what he had said (with other cases), to Perley v. Balch, cited above.

In 1816, when the case of Bradford v. Manly was before this court, and afterwards, until 1831, the law of England, on the point raised in the present case, was supposed to be as we now hold it to be here. Lord Eldon had said, in Curtis v. Hannay (3 Esp. R. 82), that he took it to be "clear law"; and so it was laid down in 2 Selw. N. P.

(1st ed.) 586, in 1807, and in Long on Sales, 125, 126, in 1821, and in 2 Stark. Ev. (1st ed.) 645, in 1825. In 1831, in Street v. Blay (2 B. & Ad. 461), Lord Eldon's opinion was first denied, and a contrary opinion expressed by the court of the king's bench. Yet our court subsequently (in 1839) decided the case of Perley v. Balch. The doctrine of that decision prevents circuity of action and multiplicity of suits, and at the same time accomplishes all the ends of justice.

Exceptions sustained.

35 Cyc. 435 (56); W. P. 607 (67). See American Uniform Sales Act, § 69.

SANBORN, J., IN KAUFFMAN *v.* RAEDER.

108 FEDERAL REPORTER, 171.—1901.

The considerations which Kauffman agreed to give to the defendants for their covenant to pay the rent and interest were (1) the use by the prospective corporation of the leased premises for a year without the payment of any rent; (2) the release of the premises from Kauffman's right to retake them for the failure to pay any installment of this rent; (3) the release of the realty company and of its proposed assignee, the Century Company, from liability to pay this rent; and (4) the assignment and transfer of the 350 shares of stock. The single consideration which the defendants agreed to give to the plaintiff for all these covenants was the payment of the $35,000 and interest on or before July 1, 1898. . . . There is another principle of law which equally prohibits the maintenance of the theory of the defendants in this case. It is stated by Lord Mansfield in Boone v. Eyre, 1 H. Bl. 273, in these words: "Where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other; but where they only go to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent." Ritchie v. Atkinson, 10 East, 295; Stavers v. Curling, 3 Bing. N. C. 355; Lowber v. Bangs, 2 Wall. 728, 736, 17 L. Ed. 768; Hague v. Ahrens, 53 Fed. 58, 3 C. C. A. 426, 3 U. S. App. 231. The breach of a covenant of the first class—a dependent covenant, one which goes to the whole consideration of the contract—gives to the injured party the right to treat the entire contract as broken and to recover damages for a total breach. Leopold v. Salkey, 89 Ill. 412; Keck v. Bieber (Pa. Sup.), 24 Atl. 170; Parker v. Russell, 133 Mass. 74; Railroad Co. v. Van Deusen, 29 Mich. 431; Richmond v. Railroad Co., 40 Iowa, 264, 275. But a breach of a covenant of the second class, an independent covenant, a covenant which does not go to the whole consideration of the contract and is subordinate and

incidental to its main purpose, does not constitute a breach of the entire contract, does not authorize the injured party to rescind the agreement, but he is still bound to perform his part of it, and his only remedy is a recovery of damages for the breach. Union Pac. Ry. Co. v. Traveler's Ins. Co., 83 Fed. 676, 679, 28 C. C. A. 1, 4, 49 U. S. App. 752, 759; Pordage v. Cole, 1 Saund. 320, note; Compbell v. Jones, 6 Term R. 570, 573; Surplice v. Farnsworth, 7 Man. & G. 576, 584; Obermyer v. Nichols, 6 Bin. 159, 160, 164; Burnes v. McCubbin, 3 Kan. 221, 226; Butler v. Manny, 52 Mo. 497, 506; Turner v. Mellier, 59 Mo. 527, 536; Pepper v. Haight, 20 Barb. 429, 440; Appalachian Co. v. Buchanan, 43 U. S. App. 265, 20 C. C. A. 33, 73 Fed. 1007. Now, the covenant of the plaintiff to assign and transfer the stock to the defendants did not go to the whole consideration of the contract, but was subordinate and incidental to its main purpose, as has already been shown. Its breach was susceptible of compensation in damages. Therefore, even though the plaintiff committed a technical breach of it, the defendants, who had accomplished the main purpose of their contract, and had accepted the benefits of the plaintiff's performance of that part of his covenants which went to the whole consideration of the agreement, the use of the leased premises by their corporation for a year without payment of the rent, and the release of the premises, of the lessee, and of its assignee from liability therefor, were still bound by their agreement to pay this rent and interest, and their only remedy for the plaintiff's breach was compensation in damages.

9 Cyc. 650 (99); 327 (10); 343 (47); W. P. 327 (10); 343 (47).

Remedies for breach of contract.

(*i.*) *Damages.*

WAKEMAN, *et al. v.* WHEELER & WILSON MANUFACTURING COMPANY.

101 NEW YORK, 205.—1886.

EARL, J. This action was brought to recover damages for the breach of an agreement made in the city of New York in February, 1878, which is set forth in the complaint as follows: "That if the plaintiffs shall succeed in placing—that is to say, selling fifty of the defendant's sewing-machines to one firm or party in the Republic of Mexico during the next trip of their agent to that country then about to be made, they, the plaintiffs, for every fifty machines so sold shall have the sole agency for the sale of the defendant's sewing-machines in that locality and its vicinity in that republic, and the defendant

should furnish to the plaintiffs machines at the lowest net gold prices." The defendant denied the agreement, but the jury found it substantially as alleged; and it is conceded that we must assume here that such an agreement was made. The plaintiffs at once entered upon the performance of the agreement, purchased a sample machine of the defendant, caused their agent to be instructed in its mechanism and management, and then sent him to Mexico. After reaching there he sold fifty machines to one Mead of San Luis Potosi, on his promise to Mead that he should be the general agent of the defendant for that locality and its vicinity. The order for the fifty machines was sent to the defendant and filled by it, and those machines were forwarded to Mexico and paid for. Shortly thereafter plaintiffs' agent made another sale of fifty machines for another locality in Mexico, and an order for those machines was sent to the defendant, which it absolutely refused to fill. Plaintiffs' agent procured another order for one machine and sent that to the defendant, which it also refused to fill; and then it refused to fill any further orders from the plaintiffs or their agents, and absolutely refused to perform and repudiated its agreement. Upon the trial of the action the plaintiffs made various offers of evidence to show the value of their contract with the defendant, the most of which were excluded. In his charge to the jury the judge held as matter of law that the plaintiffs could recover damages only for the refusal of the defendant to fill the orders actually given; and the plaintiffs' profits having been shown to be $4 on a machine, their recovery was thus limited to $204. They excepted to the rule of damages thus laid down, and the sole question for our determination is what, upon the facts of this case, was the proper rule of damages? Were the plaintiffs confined to the damages suffered by them in consequence of the refusal of the defendant to fill the two orders for fifty-one machines, or were they entitled also to recover the damages which they sustained by a total breach of the agreement on the part of the defendant? The judge limited the damages, as stated in his charge, because any further allowance of damages for the breach of the agreement would, as he claimed, be merely speculative and imaginary.

It is frequently difficult to apply the rules of damages and to determine how far and when opinion evidence may be received to prove the amount of damages; and the difficulty is encountered in a marked degree in this case. One who violates his contract with another is liable for all the direct and proximate damages which result from the violation. The damages must be not merely speculative, possible, and imaginary, but they must be reasonably certain, and such only as actually follow or may follow from the breach of the contract. They may be so remote as not to be directly traceable to the breach, or they may be the result of other intervening causes, and then they can-

not be allowed. They are nearly always involved in some uncertainty and contingency; usually they are to be worked out in the future, and they can be determined only approximately upon reasonable conjectures and probable estimates. They may be so uncertain, contingent, and imaginary as to be incapable of adequate proof, and then they cannot be recovered because they cannot be proved. But when it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the breach. A person violating his contract should not be permitted entirely to escape liability because the amount of the damages which he has caused is uncertain. It is not true that loss of profits cannot be allowed as damages for a breach of contract. Losses sustained and gains prevented are proper elements of damage. Most contracts are entered into with the view to future profits, and such profits are in the contemplation of the parties, and so far as they can be properly proved, they may form the measure of damage. As they are prospective they must, to some extent, be uncertain and problematical, and yet on that account a person complaining of breach of contract is not to be deprived of all remedy. It is usually his right to prove the nature of his contract, the circumstances surrounding and following its breach, and the consequences naturally and plainly traceable to it, and then it is for the jury, under proper instructions as to the rules of damages, to determine the compensation to be awarded for the breach. When a contract is repudiated the compensation of the party complaining of its repudiation should be the value of the contract. He has been deprived of his contract, and he should have in lieu thereof its value, to be ascertained by the application of rules of law which have been laid down for the guidance of courts and jurors. [Here follows an extended review of authorities.]

It is quite clear that the rules of damages having the sanction of these authorities were violated upon the trial of this action. The plaintiffs had the right under their agreement to establish agencies for the sale of defendant's machines anywhere in Mexico where they could sell fifty machines. An agency, when thus established, was to be exclusive, and was to have some permanency. It could not be broken up at the will of the defendant without some default on the part of the plaintiffs. That the agreement had some value to the plaintiffs is very clear, and of that value, whatever it was, they were deprived by the act of the defendant. It is quite true that that value, or, in other words, the damage caused to the plaintiffs by the total breach of the agreement by the defendant, is quite uncertain and difficult to be estimated. But the difficulty is not greater than it was in several of the cases above cited. There are some facts upon which a jury could base a judgment, not certain nor strictly accurate, but

sufficiently so for the administration of justice in such a case. The agent whom plaintiffs sent to Mexico was apparently intelligent, capable, and well acquainted with Mexico. Machines could be delivered there, for about $30 per machine, and could then be sold at retail for about $125. The profit of the plaintiffs on each machine was about $4. Plaintiffs' agents readily made sales of one hundred and one machines, and were about to make other sales. One of defendant's agents subsequently sold in a single city twenty machines in six months, at $125 each. The plaintiffs had established two agencies, and to the value of such agencies at least they were entitled. Mead, who had one of the agencies, testified, that he had made arrangements with several parties to sell the machines; that he had all the facilities for carrying on an extensive and profitable business, and was well acquainted with the country. The population of several of the Mexican cities in which plaintiffs' agent was engaged in establishing agencies was shown. From all these and other facts proved it cannot be doubted that the plaintiffs suffered damages to at least several hundred dollars, and they should not have been deprived of the damages which they made to appear because they could not make clear the full amount of their damages. All the facts should have been submitted to the jury with proper instructions, and their verdict, not based upon mere speculation and possibilities, but upon the facts and circumstances proved, would have approached as near the proper measure of justice as the nature of the case and the infirmity which attaches to the administration of the law will admit. In 1 Sutherland on Damages, 113, it is said: "If there is no more certain method of arriving at the amount, the injured party is entitled to submit to the jury the particular facts which have transpired, and to show the whole situation which is the foundation of the claim and expectation of profits so far as any detail offered has a legal tendency to support such claim." . . .

Our conclusion, therefore, is that this judgment should be reversed and a new trial granted, costs to abide event. All concur. Judgment reversed.[1]

13 Cyc. 37-38 (1-6).

[1] The general rule for damages for breach of contract is thus stated in the leading English case, Hadley v. Baxendale, 9 Exch. 341: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally —that is, according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting

(*ii.*) *Specific performance and injunction.*

a. Specific performance.

ADAMS *v.* MESSINGER.

147 MASSACHUSETTS, 185.—1888.

Bill in equity for specific performance and for an injunction. Demurrer to bill. Demurrer sustained. Plaintiff appeals.

The bill alleged that the defendant agreed to furnish to plaintiff certain steam injectors, and further agreed that in case he took out

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from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. Now the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract. It is said that other cases, such as breaches of contract in the non-payment of money, or in the not making a good title to land, are to be treated as exceptions from this, and as governed by a conventional rule. But as, in such cases, both parties must be supposed to be cognizant of that well-known rule, these cases may, we think, be more properly classed under the rule above enunciated as to cases under known special circumstances, because there both parties may reasonably be presumed to contemplate the estimation of the amount of damages according to the conventional rule." See comment on Hadley v. Baxendale, 19 H. L. R. 531.

Illustrative cases.—In Griffin v. Colver, 16 N. Y. 489, it was held, that upon a breach of a contract to deliver at a certain day a steam engine built and purchased for the purpose of driving a planing mill and other machinery, the purchaser who was injured by the delay in delivery was not entitled to recover what he might have been able to earn by the use of such engine together with his other machinery, during the time lost by the delay. The court said that the proper rule for estimating the damage was, "to ascertain what would have been a fair price to pay for the use of the engine and machinery in view of all the hazards and chances of the business."

In Cary v. Gruman, 4 Hill (N. Y.), 625, it was held that the proper measure of damages for the breach of a warranty of soundness in the sale of a horse, is the difference between the value of the horse at the time of the sale, considering him as sound, and his value with the defect complained of; and not the difference between the price paid for him, and his value with the defect.

In Green v. Boston & Lowell R. R. Co., 128 Mass. 221, the action was on contract against a common carrier to recover the value of a family portrait. The court held that the general rule of damages in contract for not delivering goods, is the fair market value of the goods. But, that this rule does not

in the United States patents for improvements in such injectors he would apply for patents in Canada, and on receiving the same assign them to plaintiff; that defendant had failed and refused to supply the injectors, and had, after taking out additional patents in the United States, failed and refused to apply for corresponding patents in Canada; that plaintiff could obtain the injectors only of defendant, and had suffered great and peculiar damages from defendant's failure to deliver them. The bill prayed that defendant might be decreed specifically to perform the agreement; that there might be assessed

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apply where the goods do not have a market value. In such a case "the just rule of damages is the actual value to him who owns it, taking into account its cost, the practicability and expense of replacing it, and such other considerations as in the particular case affect its value to the owner."

In Kountz v. Kirkpatrick, 72 Pa. St. 376, Kountz sold to Kirkpatrick & Lyon, oil, "to be delivered seller's option at any time till December 31st, at 13½ cents per gallon." Kirkpatrick & Lyon assigned the contract to Fisher & Brothers, and afterwards entered into a combination with many others to buy up oil, so as to raise the price in the market at the time Kirkpatrick & Lyon were to deliver. The court held that in the sale of chattels the general rule is, that the measure of damages for non-delivery, is the difference between the contract price and the price at the time and place of delivery; yet, when the market price is unnaturally inflated by unlawful means, the question of damages by a market value is for the jury, who may determine from the price before and after the day of delivery, and from other sources, the actual market value.

In Hamilton v. Love, 152 Ind. 641, the court held that the remedy of a servant discharged without cause, before the expiration of the period stipulated for, is not for wages, but is for the breach of the contract; the measure of damages is an amount equal to the stipulated wages for the whole period covered by the contract, less the sum earned, and which probably can by reasonable diligence be earned during the time covered by the breach; "It is not necessary that the discharged servant should allege in his complaint that since his discharge he has been unable to obtain employment, and has earned nothing. If he has, or by the exercise of reasonable diligence could have obtained employment, or earned wages after his discharge, these facts are matters of defence, and must be established by the master." This case has been followed in New York in Davis v. Dodge, 126 App. Div. 469, and in Cottone v. Murray's, 138 App. Div. 874. In the former case Gaynor J., said: "Whether damages for breach of a contract of service for a fixed term at a fixed salary by the discharge of the employé may be estimated to the end of the contract period or only up to the trial of the action, when the contract period has not yet expired, is unsettled in this State." For a case of constructive service see Allen v. Colliery Engineers Co., post. p. 723.

For further discussions and illustrations of the measure of damages, see the following cases reported herein: manufacture and sale of goods, Rochester Lantern Co. v. Stiles, *ante* p. 504; lost profits, Hale v. Trout, *ante* p. 641, Wolcott v. Mount, *ante* p. 682; breach of warranty, Freyman v. Knecht, *ante* p. 689; duty to mitigate damages, Endriss v. Belle Ice Co., *ante* p. 216; Clark v. Marsiglia, *ante* p. 651; liquidated damages and penalty, Streeper v. Williams, *ante* p. 584; installment sales, Rhoem v. Horst, *ante* p. 627.

For the allowance of interest as damages see Gray v. Central R. R. of N. J., 157 N. Y. 483.

damages growing out of defendant's neglect; and that defendant might be restrained from alienating his right to the patents in Canada.

The defendant demurred to the bill on the following grounds:

"1. That the plaintiff has not stated such a case as entitles him to any relief in equity against the defendant. 2. That the plaintiff has a plain and adequate remedy at law. 3. That the agreement, specific performance of which the plaintiff prays may be decreed, is a contract for personal services. 4. That the specific performance, which the plaintiff prays may be decreed, requires the exercise of mechanical skill, intellectual ability, and judgment. 5. That the specific performance of said agreement involves the building of a machine embodying a patent. 6. That the securing of letters patent in Canada involves the action of officers of a foreign government, and cannot be the subject of an order for specific performance. 7. That it does not appear by said bill what relief the plaintiff prays for, and the plaintiff's bill is entirely indefinite and uncertain."

DEVENS, J. It is the contention of the defendant, that the plaintiff has a full, complete, and adequate remedy at common law by an action for damages, and that the court sitting in equity cannot grant the relief sought by the prayer of the bill.

The controversy arises from the failure to perform an executory written contract. So far as this relates to personal property, the objections arising from the statute of frauds, which have sometimes been found to exist when oral contracts were sought to be enforced, have of course no application. The general rule that contracts as to the purchase of personal property are not specifically enforced, as are those which relate to real property, does not rest on the ground of any distinction between the two classes of property other than that which arises from their character.

Contracts which relate to real property can necessarily be satisfied only by a conveyance of the particular estate or parcel contracted for, while those which relate to personal property are often fully satisfied by damages which enable the party injured to obtain elsewhere in the market property precisely similar to that which he had agreed to purchase. The distinction between real and personal property is entirely subordinate to the question whether an adequate remedy can thus be afforded. If, from the nature of the personal property, it cannot, a court of equity will entertain jurisdiction to enforce the contract. Story Eq. Jur., § 717; Clark v. Flint, 22 Pick. 231. A contract for bank, railway, or other corporation stock freely sold in the market, might not be thus enforced, but it would be otherwise where the stock was limited in amount, held in a few hands, and not ordinarily to be obtained. White v. Schuyler, 1 Abb. Pr. (N. S.) 300; Treasurer v. Commercial Mining Co., 23 Cal. 390; Poole v. Middleton, 29 Beav. 646; Doloret v. Rothschild, 1 Sim. & Stu. 590. See Chaffee v. Middlesex Railroad, 146 Mass. 224.

Where articles of personal property are also peculiar and individual in their character, or have an especial value on account of the associations connected with them, as pictures, curiosities, family furniture, or heirlooms, specific performance of a contract in relation to them will be decreed. Lloyd v. Loaring, 6 Ves. 773; Fells v. Read, 3 Ves. Jr. 70; Lowther v. Lowther, 13 Ves. 95; Williams v. Howard, 3 Murphey, 74. An agreement to assign a patent will be specifically enforced. Binney v. Annan, 107 Mass. 94. Nor do we perceive any reason why an agreement to furnish articles which the vendor alone can supply, either because their manufacture is guarded by a patent or for any similar reason, should not also be thus enforced. Hapgood v. Rosenstock, 23 Fed. Rep. 86. As the value of a patent right cannot be ascertained by computation, so it is impossible with any approach to accuracy to ascertain how much a vendee would suffer from not being able to obtain such articles for use in his business.

The contract of the defendant was twofold, to furnish and deliver certain described working steam injectors within a specified time to the plaintiff, and also that, if the defendant shall make improvements in injectors for steam boilers, and shall take out patents therefor in the United States, he will apply for letters patent in Canada, and on obtaining them will assign and convey the same to the plaintiff, and that he will not do any act prejudicial to these letters patent of Canada or the monopoly thus secured.

It is said that the court will not enforce a contract for personal services when such services require the exercise of peculiar skill, intellectual ability, and judgment, and therefore that the defendant cannot be ordered to make and deliver the injectors contracted for. But the principle on which it is held that a court of equity cannot decree one to perform a personal service involving peculiar talent or skill, because it cannot so mold its order and so supervise the individual executing it that it can determine whether he has honestly obeyed it or not, has no application here.

The defendant has agreed to furnish and deliver certain injectors, which the contract shows to be patented articles. It does not appear from the bill that they were yet to be made when the contract was executed. But if it be assumed that they were, there is nothing from which it can be inferred that any skill peculiar to the defendant was required to construct them. For aught that appears, they could be made by any intelligent artificer in the metals of which they are composed. The details of their manufacture are given by reference to the patents which are referred to in the agreement, so that no difficulty such as has sometimes been experienced could have been found in describing accurately, and even minutely, the articles to be furnished. Nor are there found in the case at bar any continuous duties to be done, or work to be performed, requiring any permanent supervision,

which, as it could not be concluded within a definite and reasonable time, has sometimes been held an obstacle to the enforcement of a contract by the court.

Agreements to make an archway under a railway, or to construct a siding at a particular point for the convenience of the landowner, have been ordered to be specifically enforced. Although the party aggrieved might have obtained damages which would have been sufficient to have enabled him to pay for constructing them, and although the work to be done necessarily involved engineering skill as well as labor, he was not bound to assume the responsibility or the labor of doing that which the defendant had agreed to do. Storer v. Great Western Railway, 2 Yo. & Col. Ch. 48; Greene v. West Cheshire Railway, L. R. 13 Eq. 44. The case at bar is readily distinguishable from that of Wollensak v. Briggs (20 Bradw. [Ill.] 50), on which the defendant much relies. In that case, the defendant was to construct for the plaintiff certain improved machinery for a particular purpose, but no details were given as to the form, structure, principle, or mode of operating the proposed machine. It was obviously a contract too indefinite to enable the court to order its specific enforcement.

It is urged that specific performance of a part only of a contract will not be ordered when it is not in the power of the court to order the enforcement of the whole, and that it would not be possible to enforce that portion of the contract which relates to the application for letters patent in Canada, and the subsequent assignment of them. But where two parts of a contract are distinctly separable, as in the case at bar, there is no reason why one should not be enforced specifically, and the plaintiff compensated in damages for the breach of the other.

When a contract relates to but a single subject, and it is impossible for the defendant to perform it, except partially, the plaintiff is entitled to the benefit of such partial performance, and to compensation, if it be possible to compute what is just, so far as it is unperformed. It was therefore held in Davis v. Parker (14 Allen, 94), that where one had agreed to convey land with release of dower, and was unable to procure a release of dower, the purchaser was entitled to a conveyance without such release, with an abatement from the purchase money of the value of the wife's interest at the time of conveyance. See also Milkman v. Ordway, 106 Mass. 232, 253; Curran v. Holyoke Water Power Co., 116 Mass. 90.

We have assumed, in favor of the defendant's contention, that the only relief that the plaintiff could obtain for the breach of that portion of the agreement which relates to the application for a patent in Canada, for the improvements which the defendant had made, would be in damages. We have not intended thus to decide. That equity, by virtue of its control over the persons before the court takes cognizance of many things which they may do or be able to do abroad, while they

are themselves personally here, will not be controverted. One may be enjoined from prosecuting a suit abroad. He may be compelled to convey land situated abroad, although the conveyance must be according to the laws of the foreign country, and must be sent there for record. Pingree v. Coffin, 12 Gray, 288; Dehon v. Foster, 4 Allen, 545; Cunningham v. Butler, 142 Mass. 47; Newton v. Bronson, 13 N. Y. 587; Bailey v. Ryder, 10 N. Y. 363.

There is nothing to show that the defendant, in making his application in Canada for the patent, is compelled to leave the State, any more than he would be compelled to do so if he was an applicant at Washington. The grant of such a patent is an act of administration only. If it were to be granted here, the party would be ordered to make application. It was held in Runstetler v. Atkinson (MacArthur & Mackey 382), that where a formal assignment of an invention had not been made, but a valid agreement had been made to assign, equity would order the party to make the formal assignment, and also to make application for the patent which, in such case, would issue to the assignee. The laws of Canada, which we can know only as facts, are not before us by any allegations as to them. If all that is required by them is a formal application in writing by the inventor, there would seem to be, from the allegations of the bill, sufficient reason why the defendant should be required to make and forward it, or place it in the hands of the plaintiff to be forwarded to the Canadian authorities.

In any event, as the application is preliminary only to obtaining letters patent for the purpose of assigning them to the plaintiff, the averments of the bill taken in connection with the terms of the agreement set forth a good reason why the plaintiff may ask an assignment of his title to the improvements in question from the defendant, so far as the Dominion of Canada is concerned, and also why the defendant should be restrained from alienating or in any way incumbering any right he may have to letters patent from Canada, if the plaintiff should decide to seek his remedy in this form, rather than in damages for breach of this part of the contract.

Demurrer overruled.[1]

36 Cyc. 558 (27).

[1] "While it may be conceded that in general a court of equity will not take upon itself to make such decree where chattel property alone is concerned, its jurisdiction to do so is no longer to be doubted, and it is believed that no good reason exists against its exercise in any case where compensation in damages would not furnish a complete and satisfactory remedy."—Danforth, J., in Johnson v. Brooks, 93 N. Y. 337.

b. Injunction.

CORT *v.* LASSARD *et al.*

18 OREGON, 221.—1889.

LORD, J. This is a suit wherein the plaintiff, who is a theatrical manager, seeks to enjoin and prevent the defendants, who are acrobats, from performing at a rival theater in the same place. The plaintiff alleges, among other things, that the plaintiff and defendants entered into a contract whereby it was agreed that the defendants were to perform as acrobats, exclusively for the plaintiff, during a period of six weeks, at a salary of $60 per week, etc., that the plaintiff has performed all the conditions of his said contract, and gone to large expense in advertising, etc., and would have derived large emoluments from the performance of the defendants, which are alleged to be unique and attractive; that said defendants, after performing for the plaintiff for the space of three weeks, refused to perform longer, and engaged themselves to perform as acrobats at another theater mentioned, in said city; and that said performance of the said defendants will attract large crowds, etc., and will largely diminish, if permitted to be given, the receipts of the plaintiff, and cause an irreparable loss, etc., and diminish the attractions of his said theater, etc.; that the said defendants are entirely impecunious, and unable to respond to an action for a breach of the contract, etc. The answer denies nearly all the material allegations, but admits the hiring, etc., and then avers affirmatively that the plaintiff failed to fulfill his part of the contract, etc., and that the plaintiff discharged them, etc.; all of which was put in issue by the reply. Upon all the issues presented by the pleadings, the finding of the court was favorable to the plaintiff, with this exception: "That the performance of the said defendants was not of an unique or unusual character, but that of an ordinary acrobat and tumbler, which could have been easily supplied, with little or no delay or expense; and that said service was of a common and ordinary character, and not such as could be enjoined in equity for a breach of contract to perform," etc. As a result, the court found, as a conclusion of law, that the plaintiff was not entitled to any relief in equity, and that his suit be dismissed. The contention of counsel for the plaintiff is to this effect: (1) That it is immaterial whether the performance is unique, or involves special knowledge or skill; and (2) that the finding is contrary to the evidence, which will show that the performance was unique and unusual. In this case, there is no negative clause in the contract; but the suit, as decided by the court, assumes and admits that such a stipulation is not a prerequisite to the exercise of jurisdiction, but that it is enough to warrant equity to interfere if the contract alleged to have been broken stipulated for services which

are unique and extraordinary in their character, or which involve special skill or knowledge or ability, and provided that such services were to be rendered at a particular place or places, and for a specified time.

The question whether a court of equity will apply the preventive remedy of injunction to contracts for the services of professional workers of special merit, or leave them to the remedy at law for damages, has been the subject of much discussion, and the existence of the jurisdiction fully established. It is not, perhaps, possible, nor is it necessary, to reconcile the decisions; but the ground of the jurisdiction, as now exerted, rests upon the inadequacy of the legal remedy. In an early English case, where the jurisdiction was invoked to prevent the actor Kean from performing at another theater upon a contract for personal services, in which there was a stipulation to the effect that he should not perform at any other theater in London during the period of his engagement, it was held, as the court could not enforce the positive part of the contract, it would not restrain by injunction a breach of the negative part. Kemble v. Kean, 6 Sim. 333. But this case was expressly overruled in Lumley v. Wagner (1 De Gex, M. & G. 604) upon a like contract for personal services, to sing, during a certain period of time, at a particular theater, and not to sing elsewhere without written authority, upon the ground that the positive and negative stipulations of such contract formed but one contract, and that the court would interfere to prevent the violation of the negative stipulation, although it could not enforce the specific performance of the entire contract. In delivering this opinion, among other things, the Lord Chancellor said:

"The agreement to sing for the plaintiff during three months at his theater, and during that time not to sing for anybody else, is not a correlative contract. It is, in effect, one contract; and though, beyond all doubt, this court could not interfere to enforce the specific performance of the whole of this contract, yet, in all sound construction, and according to the true spirit of the agreement, the engagement to perform for three months at one theater must necessarily exclude the right to perform at the same time at another theater. It was clearly intended that J. Wagner was to exert her vocal abilities to the utmost to aid the theater to which she agreed to attach herself. I am of opinion that if she had attempted, even in the absence of any negative stipulation, to perform at another theater, she would have broken the spirit and true meaning of the contract, as much as she would with reference to the contract into which she has actually entered."

In Montague v. Flockton (L. R. 16 Eq. 189) it was held that an actor who enters into a contract to perform for a certain period at a particular theater may be restrained by injunction from performing at any other theater during the pendency of his engagement, notwithstanding that the contract contains no negative clause restricting

the actor from performing elsewhere. Referring to Lumley v. Wagner, *supra,* the Vice-Chancellor said:

"It happened that the contract did contain a negative stipulation, and finding it there, Lord St. Leonard relied upon it; but I am satisfied that, if it had not been there, he would have come to the same conclusion, and granted the injunction on the grounds that Mdlle. Wagner having agreed to perform at Mr. Lumley's theater, could not at the same time be permitted to perform at Mr. Gye's. But, however that may be, it is comparatively unimportant, because the subsequent authorities have completely settled this point."

As a result of these English authorities, while conceding that specific performance of such contracts could not be enforced, the jurisdiction is established that relief may be granted on a contract for such services, even though it contains no negative clause, upon the ground that a contract to act or play at a particular place for a specified time necessarily implies a prohibition against performing at any other place during that period. The American courts, while they recognize the existence of the jurisdiction, have exhibited much hesitancy in applying it to such enlarged uses. Until Daly v. Smith (49 How. Pr. 150) was decided, the doctrine of Lumley v. Wagner, *supra,* was either entirely rejected or only partially accepted. Sanquirico v. Benedetti, 1 Barb. 315; Hamblin v. Dinneford, 2 Edw. Ch. 528; Fredricks v. Mayer, 13 How. Pr. 566; Butler v. Galletti, 21 How. Pr. 465; Burton v. Marshall, 4 Gill. 487; Hayes v. Willio, 11 Abb. Pr. (N. S.) 167. In that case (Daly v. Smith, *supra*) the authorities are carefully discriminated, and the injunction was granted restraining an actress from violating her agreement to play at the plaintiff's theater for a stated period; and the case is on all fours with Lumley v. Wagner, *supra.* See also Hahn v. Society, 42 Md. 465; McCaull v. Braham, 16 Fed. Rep. 37. In Fredricks v. Mayer (13 How. Pr. 567) and Butler v. Galletti (21 How. Pr. 466) the court indicates the principle that where the services involve the exercise of powers of the mind, as of writers or performers, which are purely and largely intellectual, they may form a class in which the court will interfere, upon the ground that they are individual and peculiar.

In these cases the element of mind furnishes the rule of distinction and decision, as distinguished from what is mechanical and material, and would exclude professional workers, such as dancers and acrobats, whose performances are largely mechanical, however unique or extraordinary such performance may be. But it is apprehended that this distinction cannot be maintained, for the fact is that such actors do often possess special merit of extraordinary qualifications in their line, which makes their professional performances distinctly personal and peculiar; and that, in case of their default on a contract for services, there would be the same difficulty in supplying their places,

or in obtaining from others the same service, as would happen with actors whose merits were largely intellectual, showing the same reason to exist as much in the one case as the other for the application of the preventive remedy by injunction. Relative to this subject, the authorities indicate that the American courts have refused to interfere, unless there was a negative clause forbidding the services sought to be enjoined. Such a stipulation existed in the contract in Daly v. Smith, *supra,* upon which relief was granted, although the opinion is broad enough to include contracts without such stipulations, when the facts show that the contract is reasonable, the complainant without fault, and that he has no adequate remedy at law. To my mind, this is the correct principle to apply to such cases, even though the contract contains no negative stipulation; for, in the nature of things, a contract to act at a particular theater for a specified time necessarily implies a negative against acting at any other theater during that time. The agreement to perform at a particular theater for a particular time, of necessity involves an agreement not to perform at any other during that time. According to the true spirit of such an agreement, the implication precluding the defendant from acting at any other theater during the period for which he has agreed to act for the plaintiff follows as inevitably and logically as if it was expressed. So that, according to all the authorities, where one contracts to render personal service to another which requires special merit or qualifications in the professional worker, and, in case of default, the same service is not easily obtained from others, although the court will not interfere to enforce the specific performance of the whole contract, yet it will exert its preventive power to restrain its breach. While it is true that the court cannot enforce the affirmative part of such contract, and compel the defendant to act or perform, it can enjoin its breach, and compel him to abstain from acting elsewhere than at the plaintiff's theater. The principle upon which this doctrine rests is that contracts for such services are individual and peculiar, because of their special merit or unique character, and the inadequacy of the remedy at law to compensate for their breach in damages.

"Where," says Professor Pomeroy, "a contract stipulates for a special, unique, or extraordinary personal service or acts, or for such services or acts to be rendered or done by a person having special, unique, and extraordinary qualifications, as, for example, by an eminent actor, singer, artist, and the like, it is plain that the remedy at law of damages for its breach might be wholly inadequate, since no amount of money recovered by the plaintiff might enable him to obtain the same, or the same kind of services or acts elsewhere, or by employing any other person." Pom. Eq. Jur., § 1343.

Damages for a breach of such contracts are not only difficult to ascertain, but cannot, with any certainty, be estimated; nor could the plaintiff procure, by means of any damages, the same services in the labor

market, as in the case of an ordinary contract of employment between an artisan, a laborer, or a clerk, and their employer.

It results, then, that if the services contracted for by the plaintiff to be rendered by the defendants were unique or extraordinary, involving such special merit or qualifications in them as to make such services distinctly personal and peculiar, so that in case of a default by them, the same or like services could not be easily procured, nor be compensated in damages, the court would be warranted in applying its preventive jurisdiction and granting relief; but otherwise, or denied, if such services were ordinary, and without special merit, and such as could be readily supplied or obtained from others without much difficulty or expense. But the present case is far from being one of such character as falls under the principle of the authorities in which the preventive remedy by injunction has been allowed. There is absolutely nothing in the evidence to show that the performances of the defendants were unique or of any special merit. The plaintiff himself will not even admit that they are; while others say the performances were "great," "pretty good," "do a fair act," etc.; and others, that their performances were merely that of the ordinary acrobat, and that there would be no trouble in supplying their places, or, as one of a good deal of professional experience says, "in getting a thousand to do just as good variety business."

Indeed, according to our view of the evidence, the plaintiff fails to make a case within the principle in which equity allows a relief for a breach of contract for personal services, and the court below committed no error in dismissing the bill.

22 Cyc. 845 (18); 858–859 (4–6).

Discharge of right of action arising from breach of contract.

(i.) Discharge by consent of the parties.

a. Release.

KIDDER *v.* KIDDER *et al.*

33 PENNSYLVANIA STATE, 268.—1859.

Assumpsit on a promissory note. Judgment for defendant. Plaintiff brings error.

On the trial, the defendants gave in evidence the following release executed by the plaintiff:

"*William W. Kidder* v. *Nelson Kidder and Orris Hall.*" } Common Pleas of Warren County, Pa.

"I hereby release Nelson Kidder from all individual liability for the claim upon which the above suit is based; so that if I fail in recovering

judgment in the above suit, said Nelson Kidder shall be, and is hereby, released from all individual liability whatever in the premises.

"W. W. KIDDER.

"WARREN, PA., Jan. 9th, 1857."

The court below instructed the jury that this was a release of the cause of action, and that the plaintiff could not recover.

To this instruction the plaintiff excepted; and a verdict and judgment having been given for the defendants, he removed the cause to this court, and here assigned the same for error.

THOMPSON, J. A release under seal is sometimes called a technical release; although in equity it has no greater effect than a parol release, yet it differs from the latter in one quality materially, it is self-sustaining, the seal implying a consideration. Not so is it with a release not under seal. There a consideration of some sort is necessary to support it. 2 Dan. C. Pr. 766; Whitehill v. Wilson, 3 Penn. R. 405; 7 Barr, 100; 1 Barr, 445; 1 Rawle. Wentz v. Dehaven (1 S. & R. 312), it is thought, sustains a different doctrine. There the release was in parol; that is, it was not under seal, and expressed no consideration. It was sustained on the ground that the release of the mortgage was by way of advancement to a child. This was inferred from the form of the writing and forbearance to sue by the intestate during his life. Had it been expressed, the case would have doubtless stood firm upon a consideration. But that case has not been followed. In Kennedy v. Ware (1 Barr, 445), Gibson, C. J., finds fault with his apparent support of it in Whitehill v. Wilson (3 Penn. R.) and adds, "Wentz v. Dehaven is not to be sustained on any ground."

The release in question, in this case, is without a seal, and without any consideration expressed. As a release it was void. It was *nudum pactum,* and should have been so held by the court.

The defendant in error, feeling the force of the want of consideration, as a *dernier* resort has endeavored to give effect to the release as a gift to the releasor of one-half of the demand. But this is, if possible, a more hopeless undertaking than that of supporting the release without a consideration. It was not an executed gift, even if the instrument would bear the interpretation that a gift was intended; because the instrument to be given was not delivered. If, then, it was but an agreement to give, it could not be enforced without a consideration, any more than could the release. On this point, the case *In re* Campbell's Estate (7 Barr, 100) need only be cited. There it is said by Gibson, C. J., that "the gift of a bond, note, or any other chattel, therefore, cannot be made by words *in futuro,* or by words *in præsenti,* unaccompanied by such delivery of the possession as makes the disposal of the thing irrevocable."

But even if there had been a consideration expressed, it seems to me that the release was so qualified as not to touch this case, but only to

operate, as all such releases do in equity, as an agreement not to pursue the releasee individually. He is "hereby released from all individual liability whatever in the premises," does not touch the case on trial of joint liability. But it is not necessary to pursue this, as the points already noticed rule this case.

Judgment reversed, and a *venire facias de novo* awarded.

34 Cyc. 1048–1049 (29–34); W. P. 816 (25); 820 (45); 17 H. L. R. 200.

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b. Accord and satisfaction.

KROMER *v.* HEIM.

75 NEW YORK, 574.—1879.

Appeal from order of the General Term of the Superior Court of the city of New York, affirming an order of special term denying a motion on the part of defendant to set aside an execution issued upon judgment herein, and to have the judgment satisfied of record.

On June 24, 1876, plaintiff obtained a judgment herein for $4334.08. On July 26, 1876, and pending a stay of execution, plaintiff's attorney executed and delivered to defendant a written stipulation, in and by which plaintiff agreed to accept in settlement of the judgment, if paid within a year, $3000 in cash and an assignment of defendant's interest in a certain patent right and of the assets of such patent business, or to accept $1000 in cash, $250 down and the balance in instalments, and merchandise to be delivered in amounts stated, sufficient, with the cash payments, to reduce the judgment to $1000, and an assignment of said patent interests. Defendant paid the $250 down, and made the other cash payments and deliveries of merchandise, as specified in the second alternative of the stipulation, until the judgment was reduced to less than $1000, all of which payments were received by plaintiff without objection. Defendant then executed and tendered to plaintiff an assignment of the patent interests as required, which plaintiff declined to accept, but issued an execution to collect the balance of the judgment.

ANDREWS, J. "Accord," says Sir Wm. Blackstone, "is a satisfaction agreed upon between the party injuring and the party injured; which, when performed, is a bar to all actions upon this account." 3 Bl. Com. 15. An accord executory without performance accepted is no bar; and tender of performance is insufficient. Bac. Abr. tit. Accord and Satisfaction, C. So also accord with part execution cannot be pleaded in satisfaction. The accord must be completely executed to sustain a plea of accord and satisfaction. Bac. Abr. tit. Accord and Satisfaction, A; Cock v. Honychurch, T. Ray. 203; Allen v. Harris, 1 Ld. Ray. 122; Lynn v. Bruce, 2 H. Bl. 317. In Peytoe's

Case (9 Co. 79) it is said, "and every accord ought to be full, perfect, and complete; for if divers things are to be done and performed by the accord, the performance of part is not sufficient, but all ought to be performed." The rule that a promise to do another thing is not a satisfaction, is subject to the qualification that where the parties agree that the new promise shall itself be a satisfaction of the prior debt or duty, and the new agreement is based upon a good consideration, and is accepted in satisfaction, then it operates as such, and bars the action. Evans v. Powis, 1 Exch. 601; Kinsler v. Pope, 5 Strobhart, 126; Pars. on Cont. 683, note.

An exception to the general rule on this subject has been allowed in cases of composition deeds, or agreements between a debtor and his creditors; and they have been held, upon grounds peculiar to that class of instruments, to bar an action by a separate creditor, who had signed the composition to recover his debt, although the composition agreement was still executory. Good v. Cheesman, 2 Barn. & Ad. 335; Bayley v. Homan, 3 Bing. N. C. 915. The doctrine which has sometimes been asserted that mutual promises which give a right of action may operate and are good, as an accord and satisfaction of a prior obligation, must, in this State, be taken with the qualification that the intent was to accept the new promise, as a satisfaction of the prior obligation. Where the performance of the new promise was the thing to be received in satisfaction, then, until performance, there is not complete accord; and the original obligation remains in force. Russell v. Lytle, 6 Wend. 390; Daniels v. Hallenbeck, 19 Id. 408; Hawley v. Foote, Id. 516; The Brooklyn Bank v. DeGrauw, 23 Id. 342; Tilton v. Alcott, 16 Barb. 598.

Applying the well-settled principles governing the subject of accords to this case, the claim that the plaintiff's judgment is satisfied cannot be maintained. There is no ground to infer that the agreement of July 26, 1876, was intended by the parties to be or was accepted as a substitute for or satisfaction of the plaintiff's judgment. It was in effect a proposition on the part of the plaintiff, in the alternative, to accept $3000 in cash, if paid within one year, and the assignment of the patent and avails of the patent business, in full of the judgment of $4334.08, or to accept $1000 in cash, in instalments, and the balance in merchandise, until the judgment should be reduced to $1000; and for that balance to accept the assignment of the patent interests.

The defendant had the election between the alternatives presented by the plaintiff. He elected the latter, and paid the $1000, and supplied the merchandise, until the debt was reduced to $1000, and then tendered the assignment of the patent interests, which the plaintiff refused to accept.

The judgment clearly was to remain in force until the satisfaction

under the new agreement was complete. It is the case of an accord partly executed. So far as the plaintiff accepted performance, his claim was extinguished. So far as it was unexecuted, the judgment remained in full force; and however indefensible in morals it may be for the plaintiff to refuse to abide by the agreement in respect to the patent interests, he was under no legal obligation to accept the assignment tendered; and he had the legal right to enforce the judgment for the balance remaining unpaid.

It is clear that the right to supply the merchandise was for the benefit of the defendant. The plaintiff gave him the option to pay $3000 in cash, and assign the patent interests, or to pay $3334.08 in merchandise and assign the patent interests. The merchandise was to be furnished on "as favorable terms as would be allowed by Hoyt & Co., or New York rates for cash sales." It gave the plaintiff no benefit beyond what he would derive by any purchase in the open market of the same kind of goods. It is quite clear that the defendant preferred to pay $3334.08 in merchandise to paying $3000 in cash.

We think that no distinction arises upon the circumstances to take the case out of the general rule, that an unexecuted accord cannot be treated as a satisfaction.

The order should be affirmed. All concur.

Order affirmed.[1]

1 Cyc. 315–316 (59, 62–64); W. P. 832 (95); 14 H. L. R. 621; Williston, Accord and satisfaction, 17 H. L. R. 459.

MOREHOUSE, as Receiver *v.* SECOND NATIONAL BANK OF OSWEGO.

98 NEW YORK, 503.—1885.

APPEAL from judgment of the General Term of the Supreme Court in the Fourth Judicial Department, entered upon an order made October 19th, 1883, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee. Reported below, 30 Hun, 628.

[1] "The kind of agreement known as an accord, *i. e.*, an agreement for the compromise or settlement of a debt or other cause of action is bilateral. Of course a unilateral promise may be made by the debtor in consideration of the actual extinguishment of the debt (which can only be by release), or by the creditor to extinguish the debt in consideration of something actually given or done by the debtor; but neither of these is what is meant by an accord, which is executory on both sides. It was formerly held that an accord could not be enforced by action, either because mutual promises were not binding, or because the law would not enforce an agreement which merely substituted one cause of action for another, or for both of these reasons. The first reason of course has long ceased to exist, and the second would now, it seems, be disregarded."—Langdell, Contr., p. 106.

This action was brought by the plaintiff as receiver of one McRae, appointed in proceedings supplementary to execution, to recover under the provisions of § 5198 of the Revised Statutes of the United States, twice the amount of excessive interest alleged to have been taken and received by the defendant from McRae, prior to November 1st, 1876, on loans and discounts made by the bank to and for McRae the amount of which excessive interest, as found by the referee, was $946.75. The defendant, among other things, set up in his answer as a defense, an alleged agreement between McRae and the bank, made on or about November 1st, 1876. This agreement was found by the referee as follows: "that on or about the first day of November, 1876, an oral agreement was made between McRae and the president and vice-president of the defendant, for and on behalf of the bank, whereby McRae agreed to settle and discharge all claims and causes of action in his favor against the bank, for or on account of McRae having paid more than seven per cent, upon loans and discounts, and that all such matters be applied in payment of that part of his indebtedness to the bank, not collected by the bank from any other source, and that he would not sue or allow any other suit to be brought against the bank for or on account of such illegal interest paid to the bank, and in consideration thereof the said officers of the bank, for and in behalf of the bank, agreed that the bank would satisfy so much of the indebtedness of McRae to the bank, as remained after applying all other collections available to the bank, or would consent as a creditor to his discharge in bankruptcy, as McRae might request." When this agreement was made McRae was indebted to the bank for loans and discounts to a large amount, and on June 26th, 1879, after applying all collections made by the bank, there was then due from McRae on the indebtedness existing November 1st, 1876, without taking into account the excessive interest paid, the sum of $7847.73, no part of which has since been paid. McRae became insolvent in 1876.

The referee overruled the defense stated and directed judgment for the plaintiff for $1893.50, double the amount of the unlawful interest.

Other facts are stated in the opinion.

ANDREWS, J. The agreement of November 1st, 1876, was, we think, a good defense to the action. The General Term sustained the finding of the referee, upon the ground that the agreement, when made, was executory, that there was no subsequent execution of its provisions, and that the case was within the general principle that an accord without satisfaction is no bar to a suit upon the original cause of action. It is not, however, universally true that a cause of action on contract, or for tort, may not be extinguished by an agreement between the parties, although the agreement which is the

consideration for the satisfaction is executory. If the subsequent agreement is accepted in satisfaction, and this appears expressly or by implication, the original cause of action is merged and extinguished. Kromer v. Heim, 75 N. Y. 574, and cases cited. It is plain also, that if one having a debt or claim against another satisfies or releases it in consideration of an executory promise by the party owing the debt or duty, he cannot afterward enforce his original cause of action upon a mere failure by the other party to perform his promise, "for he has a remedy to compel performance." The agreement found by the referee from its very nature, operated as an immediate discharge and satisfaction of the claim of McRae against the bank. The mutual promises of the parties were not dependent, so as to render the discharge of the claim of McRae conditional upon full performance by the bank of its promise. He agreed to settle and discharge his claim against the bank, and to apply the same in payment *pro tanto* of his indebtedness, and further that he would not sue, or permit any suit to be brought against the bank thereon. The bank, on its part, agreed in substance to make the application, and also to satisfy the remaining indebtedness, or consent to McRae's discharge in bankruptcy as he should elect. The agreement to set off the mutual debts became executed *eo instanti*. This point was expressly adjudged in Davis v. Spencer, 24 N. Y. 386. The law, acting upon the agreement itself, made the application without further act of the parties. It is true that the exact amounts of the mutual debts do not appear to have been ascertained at the time, but they were capable of ascertainment. In Davis v. Spencer, the account on one side was, as may be inferred, unliquidated, but this did not stand in the way of the application of the principle decided. The agreement not to sue, or to permit suit to be brought, also operated as a present release and discharge of McRae's cause of action. Chandler v. Herrick, 19 Johns. 129; Addison on Cont. 270. The agreement was not a technical release, but it operated as such, and the fact that it was not under seal, or was oral, does not affect the application of the principle. Foster v. Purdy, 5 Metc. 442; Davis v. Spencer, *supra;* Farmers' Bank v. Blair, 44 Barb. 641. The only part of the agreement which was executory was the undertaking on the part of the defendant to satisfy the remaining indebtedness of McRae, or to consent to his discharge in bankruptcy at his option. The performance of this part of the agreement depended upon a prior request or election of McRae. If the bank on request should refuse performance, McRae has a remedy in an action for damages, or he can await proceedings by the bank to enforce the balance of the debt, and defend himself under the agreement. But his original claim against the bank was merged and satisfied. The claim that the bank took proceedings subsequent to the agreement, inconsistent

with it, is irrelevant here, assuming that it is well founded. It was a proper matter for the consideration of the referee, bearing upon the point whether the agreement claimed by the defendant was made; but the agreement being established, its violation by the defendant would not affect its legal operation. There is no ground for saying that the agreement was released or discharged, or in any way became inoperative. We are of opinion that upon the agreement found, the defendant was entitled to judgment. This renders it unnecessary to consider the other questions.

The judgment should be reversed.

All concur, except Ruger, C. J., not voting.

Judgment reversed.

1 Cyc. 337 (92); W. P. 834 (3); 9 H. L. R. 285.

HULL *v.* JOHNSON, *et al.*

22 RHODE ISLAND, 66.—1900.

STINESS, J. The plaintiff did work for the defendants as a carrier, for which a balance of $58.48 was due. In the course of his service, in 1895, the defendants sent him a lease of an oven, with instructions to take it from the lessee. By the agreed statement of facts it appears that he lost possession of the lease, and thereupon the defendants claimed that he was liable to them for its value, $50. The plaintiff denied his liability, and the matter rested until their settlement in August, 1898, when the above balance was due on the plaintiff's account. In settlement of this balance the defendants sent a check for $8.48 to the plaintiff and a receipt for the $50, both under cover of a letter in which the defendants said: "We hereby tender our check for the balance due on your account, which we trust will be satisfactory." On the back of the check these words were stamped: "Good only if when properly indorsed in full of all demands to date against H. A. Johnson & Co." The plaintiff took the check, struck out these words, deposited it on his account, and it was paid, through clearing, six days later, at the National Eagle Bank in Boston, on which it was drawn. On that sixth day the plaintiff returned the receipt for "loss of lease," and notified the defendants that he did not recognize his liability, and credited them with the $8.48 on account. On these facts the defendants claim an accord and satisfaction.

A tender upon a condition is not good as a tender, and payment of a less sum than is due, on an undisputed claim, even though it be offered in full settlement, does not bar a recovery for the balance. So far the parties to this suit agree, but, the sum tendered having been accepted, and the amount due being in dispute, the question arises

whether, under these facts, the parties made a settlement. Upon this question the great weight of authority is in the affirmative. The law favors the settlement of controversies, and so holds that an offer of money made and accepted on that condition binds both parties. The rule had its origin in cases of unliquidated claims where the settlement was in the nature of a compromise, but it has been extended to all cases of dispute where an offer of settlement has been made, and an acceptance signified by taking the money so offered. The law leaves the parties where their acts have put them. The principle on which the rule is founded is that one who takes money offered on condition thereby accepts the condition, and, in the absence of fraud or other excuse, he is bound by his act. In this case, although the notice stamped on the back of the check is somewhat vague, we think it clearly means, and must have been understood to mean, that the check was good only if it was accepted in full of all demands against the defendants. The plaintiff therefore received it coupled with the condition. Cases upon this subject are fully stated in exhaustive note to Fuller v. Kemp (138 N. Y. 231), 20 L. R. A. 785 and need not be repeated. We will refer only to a few recent cases which bear upon the questions arising under the peculiar facts of this case.

The first is whether the plaintiff's erasure of the condition on the check was enough to show that he did not agree to it, and hence that he has not assented to an accord and satisfaction. Numerous cases hold that it is the acceptance of the money, and not one's statement at the time, which bind him. But, however this may be, the erasure on the check was not made in the presence of the defendants, and could not have been known to them until the check had reached their bank, and had been paid. The plaintiff gave them no notice of his rejection of their offer, but took their money. He cannot, by his own act, unknown to them, change his relation to the transaction. If he had taken the money in their presence, upon the same condition, but had said to a third party, without their knowledge, that he would not accept it in full payment, the case would not have been essentially different. And yet in such a case it is evident that he would be held to have accepted the condition. In Logan v. Davidson, 45 N. Y. Supp. 961,[1] defendant sent a check in full settlement, and the next day—probably the day of its receipt—the plaintiff wrote that he credited it on account, and declined to accept it as a final payment. But the court held that the acceptance of the money operated as a satisfaction of the claim, and thus constituted a complete accord and satisfaction; that the plaintiff could not accept the money disregarding the condition, and impose a new condition upon the defend-

[1] Affirmed, 162 N. Y. 624.

ant which destroyed the one on which the payment was tendered. The same decision was made, upon similar facts, in Ostrander v. Scott, 161 Ill. 339, 43 N. E. 1089; McDaniels v. President, etc., 29 Vt. 230; Looby v. Village of West Troy, 24 Hun, 78, Reynolds v. Lumber Co., 85 Hun, 470, 33 N. Y. Supp. 111; and Potter v. Douglass, 44 Conn. 541. See, also, Bull v. Bull, 43 Conn. 455, and Perkins v. Headley, 49 Mo. App. 556.

The second question is whether in this case the plaintiff's claim can properly be regarded as disputed, since his bill is admitted, and the defendants' claim is distinct from it, by way of recoupment for injury arising from the plaintiff's service. It is true that there is a technical difference between such a case and one of a controversy as to the amount due, but the principle which governs them is the same. Whatever may be the ground of the dispute, the fact remains that there is one. In order to settle the controversy, the defendant offers to pay a certain sum on that condition, and the acceptance of the money so offered is as much an acceptance of the condition in one case as in the other. Such was the decision in Lumber Co. v. Brown, 68 Vt. 239, 35 Atl. 56, where the defendant's claim was based upon a poor quality of lumber delivered, and damage arising from a failure to deliver it within the time agreed; also, in Tanner v. Merrill, 108 Mich. 58, 65 N. W. 664, 31 L. R. A. 171, where the question in dispute was the right of the defendant to deduct the transportation of the plaintiff to and from his place of business. We are of opinion that the plaintiff's acceptance of the money offered in settlement amounted to an accord and satisfaction, and precludes him from maintaining an action for the balance which he claims to be due. Case remitted to district court, with direction to enter judgment for the defendant for costs.[1]

1 Cyc. 329–331 (61–67); W. P. 839 (30); 840 (33); 15 H. L. R. 589; 17 H. L. R. 272; 18 H. L. R. 617; 25 H. L. R. 182.

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[1] In Tanner v. Merrill, 108 Mich. 58, the defendants were lumbermen, and the plaintiff worked for them at Georgian Bay, his transportation from Saginaw to that place having been paid by them. When he quit work, a question arose as to who should pay this, under the contract of employment, and the defendants' superintendent declined to pay any transportation. The plaintiff needed the money due him to get home, and showed a telegram announcing the illness or death of his mother, and said that he must go home, to which the superintendent replied that "he did not pay any man's fare"; whereupon a receipt in full was signed, and the money due, after deducting transportation, was paid. The court said: "Clearly the claim was disputed, and, so far as the record shows, the defendants' superintendent was given to understand that the money paid was accepted in full satisfaction, as plaintiff's own evidence shows that he gave the receipt without protest, and without stating to the defendants' superintendent what he said, aside, to his fellow laborers, that it would make no difference if they did give the receipts. To hold otherwise would be a recogni-

(*ii.*) *Discharge by the judgment of a court of competent jurisdiction.*

MILLER *v.* COVERT.

1 WENDELL (N. Y.), 487.—1828.

Action for work and labor. Set-off by defendant for hay sold and delivered. Judgment for defendant.

Plaintiff proved a claim for work and labor for $4.16. Defendant proved the sale and delivery to plaintiff of three tons of hay at $8 a ton.

Plaintiff proved that before the beginning of this suit the defendant had sued out an attachment against plaintiff, on the trial of which defendant proved the sale and delivery of one ton and nineteen

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tion of the 'mental reservation' more effective than just. Upon the plaintiff's own testimony he accepted the money, with the knowledge that the defendants claimed that the amount paid was all that was his due, and gave a receipt in full. There is nothing in the case to negative the inference naturally to he drawn from this testimony, that there was an accord and satisfaction of an unliquidated demand."

Distinction between accord and satisfaction, and compromise of a disputed claim.—In Flegal v. Hoover, 156 Penn. St. 276, the court said, "This case was unfortunately tried on a wrong basis throughout. It was assumed that the agreement of May, 1892, was an accord, and as its terms had not been fully carried out, that there had been no satisfaction; that the agreement was, therefore, inoperative, and the parties were remitted to their rights and liabilities under the original contract. This was a radical error. The agreement of May, 1892, was a compromise of disputed rights. The defendants claimed that the plaintiff was violating the contract in such manner as to entitle them to rescind, and they had in fact taken possession of the land a short time before by force. The plaintiff, on the other hand, claimed that he was pursuing his contract rights, and he had in turn ousted the defendants by force from the land. The parties then came together, agreed upon a settlement, put its terms in writing, which was signed by both, and partly carried out. Such an agreement is not an accord, but a compromise, and is as binding as any other contract."

Distinction between accord and satisfaction, and a new substituted contract.—In Bandman v. Finn, 185 N. Y. 508, the court said: "Doubtless the general rule is that an executory agreement for accord without satisfaction made under it does not bar a cause of action, and that tender of performance is insufficient for that purpose. (Ryan v. Ward, 48 N. Y. 204; Kromer v. Heim, 75 N. Y. 574.) It is also the rule that payment of a less sum than that due does not constitute a valid satisfaction, although otherwise if the debtor gives the creditor additional security. (Jaffray v. Davis, 124 N. Y. 164.) These rules, however do not apply to the present case. At the time of the agreement between the parties in November, 1903, there had been no breach of the written contract with the defendant. Under that contract he was obligated to pay only in one of two contingencies, on the completion of the roof of the contemplated building on such premises, or in case of a sale of the same by the defendant. Neither of these contingencies had occurred. Therefore, the situation was that of a creditor holding an unmatured and contingent obligation, agreeing with his debtor for the surrender of the obligation."

hundredweight of hay on a contract for three tons, and said if A. R. were present he could prove the whole, but that he would reserve the remainder as there were accounts between the parties. Judgment for the one ton and nineteen hundredweight had been paid.

The court refused to charge that defendant could not set off the remainder of the demand in this action, and charged that he was not barred by the former suit.

SUTHERLAND, J. The court below erred in permitting Covert, the defendant, to prove and set off against Miller his account for the balance of the three tons of hay sold and delivered to him in January, 1827. The sale of the hay was by one single indivisible contract. Miller agreed to purchase three tons of hay from Covert, and Covert agreed to sell it to him if he had so much to spare, and in the course of a few days delivered the whole. It is perfectly settled, that if a plaintiff bring an action for a part only of an entire and indivisible demand, the verdict and judgment in that action are a conclusive bar to a subsequent suit for another part of the same demand. The cases of Smith v. Jones (15 Johns. R. 229), of Farrington & Smith v. Payne (15 Johns. R. 432), of Willard v. Sperry (16 Johns. R. 121), and Phillips v. Berick (16 Johns. R. 136) are precisely in point. If Covert could not have brought an action for the residue of the three tons of hay, he of course could not avail himself of it by way of set-off when sued by Miller.

Judgment reversed.

23 Cyc. 1106 (83); 1174 (85).

VANUXEM *et al v.* BURR.

151 MASSACHUSETTS, 386.—1890.

Contract upon promissory note. Defense, former suit. Judgment for defendant.

The following facts were agreed:

"The former action therein referred to was an action between the same parties begun before the maturity of the note now in suit; the declaration therein contained three counts, one upon a promissory note, and two upon a special agreement to procure the indorsements of the defendant's mother upon the last-named note and two others, one of which was the note sued on in this case. After judgment had been entered for the plaintiffs in the present suit in the municipal court, and the appeal taken by the defendant had been duly entered in the Superior Court, the plaintiffs recovered judgment in said former suit in the Superior Court by default, and by agreement damages were assessed at the amount due on said three notes, including the one now sued on."

The judge refused to enter judgment for the plaintiffs, and found for the defendant.

HOLMES, J. This is an action upon a promissory note made by the defendant. The only defense is, that in another action upon a contract to procure the defendant's mother's indorsement to this note and to two others, the plaintiffs, since the present suit was brought, have recovered judgment against the defendant for damages assessed by agreement at a sum equal to the amount due on the three notes. If this judgment is not a bar, it is admitted that the plaintiffs are entitled to recover.

The two contracts were both in existence at the same time. They were distinct from each other in form, as appears from the statement of them. They were also distinct in substance. Supposing that the defendant could do no more to bind himself personally to pay the money to the plaintiffs than he did by making the note, still his promise to get the security of an indorser affected other things besides his personal payment or his personal obligation to pay. Its performance or breach affected the plaintiffs' power to discount the note before it was due, and the probability of their getting payment from another whom the defendant might be able to persuade to indorse, when he could not or would not induce her to pay if she had not indorsed. As the contracts were both in existence, and were different, and as they were both broken, it is plain that plaintiffs have had two different causes of action, and there is no need to refer to the tests of difference which have been laid down in the books. Eastman v. Cooper, 15 Pick. 276, 286; Lechmere v. Fletcher, 1 Cr. & M. 623, 636. The question arises solely on the effect of the judgment.

What we mean when we say that a contract is legally binding is, that it imposes a liability to an action unless the promised event comes to pass, subject to whatever qualifications there may be to the absoluteness of the promise. Generally, if a man is content to make two legally binding contracts, he consents to accept the legal consequence of making two instead of one, namely, liability to a judgment upon each unless he performs it. It would be anomalous if a judgment without satisfaction upon one cause of action were held to be a bar to a suit upon another and distinct cause of action. No doubt, two contracts may be such that performance of one of them, or satisfaction of a judgment upon one of them, would prevent a recovery upon the other, either altogether or for more than nominal damages. In this commonwealth the decisions have gone somewhat further than elsewhere in treating satisfaction of one judgment as an absolute bar to another action. Gilmore v. Carr, 2 Mass. 171; Savage v. Stevens, 128 Mass. 254. But instances are too numerous and familiar to need extended mention, where the mere recovery of a judgment is held no bar to another action, although the satisfaction of it would be.

Simonds v. Center, 6 Mass. 18; Porter v. Ingraham, 10 Mass. 88; Elliott v. Hayden, 104 Mass. 180; Byers v. Franklin Coal Co., 106 Mass. 131, 136. This principle is applied, not only to actions against different parties, such as the maker and indorser of a note, or joint tort-feasors, but to actions against the same individual when he has given different obligations in respect of what is in substance the same debt. Thus, judgment upon a note given by an obligor as collateral security for his bond is no bar to a subsequent action upon the bond. Lord v. Bigelow, 124 Mass. 185, 189; Drake v. Mitchell, 3 East, 251; Lechmere v. Fletcher, 1 Cr. & M. 623; Fairchild v. Holly, 10 Conn. 474; Davis v. Anable, 2 Hill (N. Y.), 339; Burnheimer v. Hart, 27 Iowa, 19. See Greenfield v. Wilson, 13 Gray, 384; Moore v. Loring, 106 Mass. 455; Miller's River National Bank v. Jefferson, 138 Mass. 111; Stillwell v. Bertrand, 22 Ark. 379; Corn Exchange Ins. Co. v. Babcock (No. 2), 8 Abb. Pr. (N. S.) 256; United States v. Cushman, 2 Sumner, 426, 440.

The principle of the cases lasted cited is decisive of the one at bar. No distinction favorable to the defendant can be taken bebetween an agreement made as itself collateral security, and an agreement to furnish collateral security. If there were any difference, it would be in favor of the plaintiffs; for the collateral contracts recovered on in the cases cited were simply other contracts of the defendant to pay money, whereas the contract of this defendant was a contract to get a third person to indorse, as we have stated. It is true, that in most cases there were other parties defendant in the first or second suit. But that circumstance had nothing to do with the ground of the decisions, as indeed it could not have had by any technical rule. The ground was that stated by Lord Ellenborough in Drake v. Mitchell, and approved by this court in Lord v. Bigelow: "A judgment recovered in any form of action is still but a security for the original cause of action, until it be made productive in satisfaction to the party; and therefore till then it cannot operate to change any other collateral concurrent remedy which the party may have." Parsons, C. J., states the law in the same way: "A judgment in a suit, where the action is given as a remedy merely cumulative, is no bar, unless such judgment has been satisfied; for, although there may be two remedies, there can be but one satisfaction." Storer v. Storer, 6 Mass. 390, 393.

The technical effect of the judgment as a bar would be the same, whether the defendant in both suits were the same, or other defendants were joined in any one of them. The rule as stated by the courts in all the cases applies with equal force, whichever may be the fact. If we were to depart from that rule, and to say that a man should have but one judgment, although he had different causes of action, when we thought he could get from a single judgment all the satis-

faction he was likely to get, we should be legislating, instead of following the precedents, and legislating in very doubtful accord with the contracts of the parties.

Exceptions sustained.

23 Cyc. 1193 (69).

GOLDBERG *v.* EASTERN BREWING CO.

136 N. Y. APPELLATE DIVISION, 692.—1910.

JENKS, J. This action was brought in October, 1908, for breach of the covenant in a lease that the lessee would make all repairs necessitated by wear and tear during the term, and at the expiration thereof would quit and surrender the premises in as good state and condition as reasonable use and wear would permit. The lease expired on May 1, 1908. The defendant pleaded in bar a judgment in a former action to recover rent under the lease, which went to judgment and satisfaction thereof prior to the beginning of this action. The defendant supported this plea, the Municipal Court gave judgment upon it, and the plaintiff appeals. I think that the judgment should be affirmed. Bendernagle v. Cocks, 19 Wend. 207, 32 Am. Dec. 448; Yates v. Fassett, 5 Denio, 21; Secor v. Sturgis, 16 N. Y. 548; Jex v. Jacob, 19 Hun, 105; Bliss on Code Pleading, § 118; 1 Encyclopedia of Pleading and Practice, p. 153. The principle is well stated in the Encyclopedia of Pleading and Practice as follows: "But where there are breaches of several and distinct covenants contained in the same instrument, all these breaches must be sued for together; while independent stipulations may be sued for as the breaches occur, all the breaches existing at the time the action is brought are only one cause of action." The reason for the rule of bar is said to rest upon the two maxims, *Interest reipublicæ ut sit finis litium,* and *Nemo debet bis vexari, pro una et eadem causa.* United States v. Throckmorton, 98 U. S. 65, 25 L. Ed. 93.

The learned counsel for the appellant cites, among other authorities, McIntosh v. Lown, 49 Barb. 550. But in Jex v. Jacob, *supra,* the court, per Daniels, J., disapproves of that case, and says that it was clearly opposed to those which preceded it, as it has been to the cases following it, and for that reason it could not be regarded as a correct exposition of law on this subject. Of the other cases cited, all are to be noticed hereafter save Fox v. Phyfe, 36 Misc. Rep. 207, 73 N. Y. Supp. 149, which recognizes the rule of Secor's Case, *supra,* and which bears no analogy upon the facts. Secor's Case expresses the principle thus: "The true distinction between demands or rights of action which are single and entire and those which are several and distinct is that the former immediately arise out of one

and the same act or contract and the latter out of different acts or contracts. Perhaps as simple and safe a test as the subject admits of, by which to determine whether a case belongs to one class or the other, is by inquiring whether it rests upon one or several acts or agreements." The appellant says that Bendernagle's Case must be considered to be overruled by Perry v. Dickerson, 85 N. Y. 345, 39 Am. Dec. 663. It is not overruled, for the court, per Andrews, J., say that, if it is subject to any criticism, it is because of the application of the doctrine to the facts of the case, and that it is "an extreme case."

Perry v. Dickerson presented the question whether a judgment in an action to recover damages for a wrongful dismissal before the expiry of the stipulated term of service was a bar to a subsequent suit for wages earned by the plaintiff, due and payable before the dismissal, and the court say that, although in a sense the two causes of action arose out of the contract, yet the right of wages was given by it, and the right to damages arose from the wrong which put an end to it; and the court points out that the right to receive the wages was definite, or could be made so, when they were due, while the damages for the wrongful dismissal could not be ascertained exactly until the stipulated period of the service had expired. In the case at bar there were breaches of the one express contract, the lease, already committed, for the lease expired on May 1, 1908, and the first action was not brought until some months thereafter, and in Bendernagle's Case, *supra,* Cowen, J., says: "I have been able to find but one case which holds that, there being several breaches of the same contract already committed, the party may bring a several action for each." And also: "I admit that the rule does not extend to several and distinct trespasses or other wrongs (White v. Moseley, 8 Pick. [Mass.] 356), nor, as we have seen, to distinct contracts. It goes against several actions for the same wrong, and against several actions on the same contract. All damages accruing from a single wrong, though at different times, make but one cause of action; and all debts or demands already due by the same contract make one entire cause of action. Each comes under the familiar rule that, if a party will sue and recover for a portion, he shall be barred of the residue."

In any event I think that we have an express approval of the rule in Bendernagle's Case, *supra,* and in Pakas v. Hollingshead, 184 N. Y. 211, at page 215, 77 N. E. 40, 41, 3 L. R. A. (N. S.) 1042, 112 Am. St. Rep. 601, where the court, per O'Brien, J., say: "It was held in the case of Bendernagle v. Cocks, 19 Wend. 207 [32 Am. Dec. 448], that where a party had several demands or existing causes of action growing out of the same contract or resting in matter of account, which may be joined and sued for in the same action, they must be joined; and if the demands or causes of action be split up, and a

suit brought for part only, and subsequently a second suit for the residue is brought, the first action may be pleaded in abatement or in a bar of the second action. That, it seems to us, is what has been decided in this case. The case referred to was elaborately discussed by Judge Cowen, and the English authorities on the subject cited and distinguished." And in Lorillard v. Clyde, 122 N. Y. 45, 25 N. E. 292, 19 Am. St. Rep. 470, Vann, J., writing for the court, cites both Bendernagle's Case, *supra,* as well as Jex v. Jacob, *supra,* among his authorities. The learned Municipal Court judge rested his decision on Kennedy v. City of New York, 127 App. Div. 89, 111 N. Y. Supp. 61, which was reversed in 196 N. Y. 19, 89 N. E. 360, without affecting the rule stated and applied in the judgment of the Appellate Division.

The judgment of the Municipal Court is affirmed, with costs. All concur.

23 Cyc. 1189-1190 (54-55).

ALLEN *v.* COLLIERY ENGINEERS' CO.

196 PENNSYLVANIA STATE, 512.—1900.

Action by William D. Allen against the Colliery Engineers' Company for wages under a contract of employment. From a judgment in favor of defendant on a demurrer to the surrebutter, plaintiff appeals. Reversed.

FELL, J. The judgment appealed from was entered on a demurrer to a surrebutter. We are asked, however, to determine the right of the plaintiff to recover without regard to the technical questions raised by the pleadings. The facts alleged are that the plaintiff was employed by the defendant as a manager of a branch of its business for one year, beginning January 12, 1898, at a salary of $75 per week. On July 2, 1898, he was discharged without cause. On July 18th, he sued the defendant for two weeks' salary in the district court of the city of Brooklyn, N. Y., and recovered a judgment therefor, which has been paid. This action was brought after the expiration of the time for which the plaintiff was employed to recover the salary for the balance of the year. The defendant pleaded the recovery of the judgment in New York in bar. It is conceded that while the plaintiff was in the employ of the defendant he could have maintained a separate action for each week's salary as it became due; but it is contended that after his discharge his only remedy was an action for damages for the breach of the contract, and that, as there can be but one recovery on that ground, he is concluded by the action brought in New York.

The generally recognized rule is that an employé for a fixed period,

who has been wrongfully discharged, may either treat the contract as existing, and sue for his salary as it becomes due, not on a *quantum meruit,* but by virtue of the special contract, his readiness to serve being considered as equivalent to actual service, or he may sue for the breach of contract at once or at the end of the contract period, but for the breach he can have but one action. 2 Smith, Lead. Cas. 38, note to Cutter v. Powell; 7 Am. Law. Reg. (N. S.) 148, note to Huntington v. Railroad Co. Our cases are in entire harmony with this rule. In Algeo v. Algeo (10 Serg. & R. 235), it was held that, where the performance of services had been prevented by the discharge of the employé, he must declare on the special agreement, and could not recover on the implied promise, as the law would infer a promise from the acts of the plaintiff only, and not from the acts of prevention by the defendant. In Telephone Co. v. Root (Pa. Sup.) 4 Atl. 828, the plaintiff sued during the contract period on an agreement which, as in this case, was severable because the consideration was apportioned. In the opinion in Kirk v. Hartman (63 Pa. St. 97), it was said by Sharswood, J., that a servant dismissed without cause before the expiration of a definite period of employment could maintain an action of debt on the special agreement.

It follows that if the recovery in the New York court was for the installments of salary then due, as alleged in the declaration in this case, the plaintiff may maintain his action; if it was for damages for the breach of the contract as averred in the plea filed, he is concluded by it. There is nothing in the record before us which throws any light upon this question, and the case must go back for decision in the common pleas.

The judgment is reversed, with a procedendo.[1]

26 Cyc. 999 (3–4); 14 H. L. R. 294; 22 H. L. R. 537.

ALIE *v.* NADEAU.

93 MAINE, 282.—1899.

This was an action by the plaintiff to recover wages for the last two months of a period of six months, under an agreement entered into November 9, 1897, wherein defendant agreed to employ plaintiff for six months at wages of $10 per week, payable weekly.

After keeping plaintiff in his employ about two months, or to January 15, 1898, defendant discharged him without cause. March 12, 1898, the plaintiff brought suit to recover the wages due him up to that time, and on trial a jury found for the plaintiff on all

[1] The doctrine of "constructive service" is rejected in New York in Howard v. Daly, 61 N. Y. 362.

the issues, and rendered judgment for the wages due up to March 12, 1898. This judgment has been satisfied.

The present suit was brought at the expiration of the six-months period to recover the balance of wages due after March 12, 1898. The jury rendered a verdict for the plaintiff, and the defendant took exceptions to the refusal of the court to nonsuit the plaintiff, and also upon the court's refusing to make certain rulings requested by defendant, which appear in the opinion.

SAVAGE, J. The plaintiff brings this action to recover damages for the breach of a contract of service, whereby the plaintiff alleges that he agreed to enter and remain in the employment of the defendant for the period of six months from the 9th day of November, 1897, and that the defendant agreed to hire the plaintiff for the same period, and to pay him for his labor the sum of $10 per week. The plaintiff further alleges that he entered upon the performance of the contract upon his part, and continued to work until January 15, 1898, upon which day he was discharged by the defendant, without lawful cause.

The case shows that the plaintiff was paid all wages due him up to the time of his discharge. On March 12, 1898, the plaintiff commenced an action against the defendant for damages, alleging the same breach of the same contract as is alleged here, and claiming damages to the date of his writ. In that action he ultimately recovered judgment in damages for an amount equal to the weekly wages agreed upon from January 15, 1898, to March 12, 1898.

This action was commenced November 23, 1898, and the plaintiff now claims to recover damages from March 12, 1898, to May 9, 1898, the remainder of the period covered by the contract. At the close of the testimony, the defendant's counsel requested the presiding justice to instruct the jury that the judgment in the former action was a bar to recovery in this suit. To a refusal to give this instruction the defendant excepted.

We think the requested instruction should have been given. Here is a single and indivisible contract, a hiring for the period of six months. When the defendant discharged the plaintiff, he broke the contract. He broke it altogether. But there was only one breach. The plaintiff urges that, while the contract was entire, the performance was divisible; that each week's work constituted a performance so far, and that the defendant was in default each week he failed to continue plaintiff in his employment. Hence the plaintiff claims that an action will lie for each default. A little examination will show that this position cannot be sustained.

The contract of the defendant may be viewed in a twofold aspect. In the first place, he agreed to continue the plaintiff in his employment for a period of six months. That contract was entire and in-

divisible. There was a single breach of that part of the contract. He also agreed, we will assume, to pay the plaintiff weekly. Performance of that part of the contract by the defendant was divisible, and the plaintiff might have maintained an action for wages for services performed on each failure of the defendant to pay as he agreed. To this effect are most of the cases cited by the plaintiff from our own decisions. But such is not this case. After the plaintiff was discharged, he performed no more service, and was entitled no longer to wages as such, for the contract was at an end. The damage was the loss of his contract right to earn wages. He was entitled to recover all the damages he sustained by the breach, both present and prospective, and for such a breach but one action can be maintained. Sutherland v. Wyer, 67 Me. 64. The plaintiff brought an action for breach of contract, and recovered judgment for damages. It is to be presumed that he recovered all he was entitled to receive for that breach. We think the principles stated in Sutherland v. Wyer, *supra,* are decisive upon this point. See, also Miller v. Goddard, 34 Me. 102; Colburn v. Woodworth, 31 Barb. 381; Olmstead v. Bach, 78 Md. 132; James v. Allen Co., 44 Ohio St. 226, and cases cited; 2 Sedgw. Dam. (8th ed.), § 366.

But the plaintiff contends that the rule should not apply here, because in his first writ he claimed damages only to May 12, 1898. If this contention is sound, it follows that any litigant may sever an indivisible contract, and become entitled to maintain several actions as for several breaches of it, simply by limiting his claim for damages in his earlier actions to less than full damages. We think this cannot be done. As we have already suggested, the law presumes that the plaintiff alleged and recovered in his first action all the damages that he sustained.

Exceptions sustained.

23 Cyc. 1177 (94-95); 26 Cyc. 999 (5); W. P. 876 (27).

(*iii.*) *Discharge by lapse of time.*

MANCHESTER *et al. v.* BRAEDNER.

107 NEW YORK, 346.—1887.

Appeal from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 9, 1885, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

This action was commenced June 20, 1882, to recover for building materials furnished and delivered by plaintiffs to defendant. The defense was the statute of limitations.

It appeared that defendant in February, 1876, entered into an agreement with one Hoover, who was engaged as contractor in building certain houses, to do all the plastering for a sum agreed upon, payable in instalments as the work progressed. Plaintiffs agreed to furnish the materials, defendant agreeing to pay therefor in cash as wanted. In pursuance of this agreement plaintiffs furnished, between March 1 and June 12, 1876, materials from time to time as ordered. About that time Hoover became embarrassed and abandoned the work. The sub-contractors, and among them defendant, entered into an arrangement with Hoover to continue the work, and defendant delivered to plaintiffs three orders on Hoover, dated June 21, 1876, for sums aggregating the amount of their bill, payable, as the work progressed, from the sums coming to him under his contract. Defendant resumed his work, but in a few days abandoned it and refused to go on with the same.

ANDREWS, J. When one delivers to another an order on a third person to pay a specified sum of money to the person to whom the order is given, the natural import of the transaction is, that the drawee is indebted to the drawer in the sum mentioned in the order, and that it was given to the payee as a means of paying or securing the payment of his debt. In other words, it implies the relation of debtor and creditor between the parties to the extent of the sum specified in the order and a willingness on the part of the debtor to pay the debt. The transaction may be consistent with a different relation and another purpose, but in the absence of explanation, that is its natural and ordinary meaning. See Bogert v. Morse, 1 N. Y. 377. The oral evidence shows that the defendant was owing the plaintiffs the amount specified in the several orders of June 21, 1876, and that they were given to secure the payment of the debt, thus fully corroborating the inferences deducible from the order themselves. We think the orders constituted an acknowledgment in writing of the debt, within section 110 of the Code, and continued the debt for the period of six years from their date. The decisions as to what is a sufficient acknowledgment of a debt, to take it out of the statute, are very numerous and not altogether harmonious. It seems to be the general doctrine that the writing, in order to constitute an acknowledgment, must recognize an existing debt, and that it should contain nothing inconsistent with an intention on the part of the debtor to pay it. But oral evidence may be resorted to, as in other cases of written instruments, in aid of the interpretation. Consistently with this rule, it has been held that oral evidence is admissible to identify the debt and its amount, or to fix the date of the writing relied upon as an acknowledgment, when these circumstances are omitted (Kincaid v. Archibald, 73 N. Y. 189; Lechmere v. Fletcher, 3 Tyrw. 450; Bird v. Gammon, 3 Bing. N. C. 883), or to explain ambiguities. 1 Smith's

Lead. Cas. 960, and cases cited. The promise to be inferred from the order was not conditional in the sense that the debt was to be paid only out of the fund in the hands of the drawee. At most, there was an appropriation of that fund for the payment of the debt, but the language of the orders did not import that the debt was to be paid only out of the fund against which they were drawn. See Winchell v. Hicks, 18 N. Y. 558; Smith v. Ryan, 66 Id. 352. The defendant by his own act in abandoning the contract with Hoover, the drawee, prevented the payment of the orders and left him subject to the general obligation of payment resting upon all debtors.

The judgment should be affirmed. All concur.

Judgment affirmed.

25 Cyc. 1337 (47); W. P. 777 (10).

ALLEN *v.* COLLIER.

70 MISSOURI, 138.—1879.

NORTON, J. The defendant in this case interposed the plea of the statute of limitations in bar of plaintiff's right of action on a note executed by his intestate to plaintiff, dated January 10, 1864, for $134, due from its date. To take the case from under the operation of the statute plaintiff offered in evidence a certain writing contained in the private account-book of defendant's intestate, signed by said intestate, purporting to be a will written in pencil. Said writing was not attested and was found among the papers of the intestate after his death, and contained the following words: "That out of my estate she (alluding to his wife) shall pay all my just debts, including a debt due my mother of about $400."

The only question presented in the case is whether the said writing was such an acknowledgment as would prevent the operation of the limitation law. The court below held that it was not sufficient, and gave effect to the defendant's plea of the statute, and this action of the court is assigned for error. There is a conflict of the authorities as to whether an acknowledgment or promise in writing, signed by the party to be bound, if made to a stranger, would be sufficient to take a case from under the operation of the statute of limitations, but there is no conflict, as to the necessity for such promise or acknowledgment being made to some person, either to the creditor or his representative, or to a stranger. A promise or acknowledgment implies that it is made to somebody, and in every promise there must necessarily be a promisor and promisee. The will in question was never attested, and was, therefore, no will. A mere writing acknowledging a debt, which is retained by the person making it, and which is never delivered either to the creditor or any one else, cannot have

the effect of preventing the operation of the statute. In the case of Merriam v. Leonard (6 Cush. 151), where the acknowledgment of the debt was contained in a mortgage duly executed and acknowledged, which was never delivered to the mortgagee, but was found after the mortgagor's death among his papers, Justice Shaw held that it did not amount to an acknowledgment of the debt or of a willingness or intention to pay from which a promise could be implied. The deed was never delivered, and of course was not an instrument by which the signer was bound. Judgment affirmed. All concur except Judge Napton.

25 Cyc. 1346 (30-31).

CHAPTER IV.

Impossibility of Performance.

General rule.

ANDERSON *v.* MAY.

50 MINNESOTA, 280.—1892.

Action for price of seeds. Defense, damages for breach of contract. Verdict for plaintiff. Defendant appeals.

Gilfillan, C. J. The defendant having alleged as a counterclaim a contract in June, 1890, between him and plaintiff, whereby the latter agreed to sell and deliver to the former, on or before November 15th, certain quantities of specified kinds of beans, and that he failed so to do except as to a part thereof, the plaintiff, in his reply, alleged in substance that the contract was to deliver the beans from the crop that he should raise that year from his market gardening farm near Red Wing. Upon the trial the contract was proved by letters passing between the parties. From these it fairly appears that the beans to be delivered were to be grown by plaintiff, though it cannot be gathered from them that he was to grow the beans on any particular land. They contain no restriction in that respect. There can be no question that, if grown by him, and of the kinds and quality specified, defendant would have been obliged to accept the beans, though not grown on any land previously cultivated by plaintiff. The contract, therefore, was, in effect, to raise and sell and deliver the quantities, kinds, and quality of beans specified,—a contract in its nature possible of performance.

As an excuse for not delivering the entire quantity contracted for, the plaintiff relies on proof of the fact that an early unexpected frost destroyed or injured his crop to such extent that he was unable to deliver the entire quantity.

What, in the way of subsequently arising impossibility for the party to perform, will suffice as excuse for non-performance of a contract, is well settled in the decisions; the only apparent difference in them arising from the application of the rules to particular circumstances. The general rule is as well stated as anywhere in 2 Chit. Cont. 1074, thus: "Where the contract is to do a thing which is possible in itself, or where it is conditioned on any event which happens, the promisor will be liable for a breach thereof, notwith-

standing it was beyond his power to perform it; for it was his own fault to run the risk of undertaking to perform an impossibility, when he might have provided against it by his contract. And therefore, in such cases, the performance is not excused by the occurrence of an inevitable accident, or other contingency, although it was not forseen by, or within the control of, the party." An application of this rule is furnished by Cowley v. Davidson, 13 Minn. 92 (Gil. 86). What is sometimes called an "exception to the rule" is where the contract is implied to be made on the assumed continued existence of a particular person or thing, and the person or thing ceases to exist, as, where it is for personal service, and the person dies, or it is for repairs upon a particular ship or building, and the ship or building is destroyed. An agreement to sell and deliver at a future time a specified chattel existing when the agreement is made would come under this exception. The exception was extended further than in any other case we have found in Howell v. Coupland, L. R. 9 Q. B. 462. That was a contract to sell and deliver a certain quantity from a crop to be raised on a particular piece of land and the entire crop was destroyed by blight. The court held the contract to be to deliver part of a specific thing, to wit, of the crop to be grown on a given piece of land, and held it to come within the rule that, where the obligation depends on the assumed existence of a specific thing, performance is excused by the destruction of the thing without the parties' fault. Without intimating whether we would follow that decision in a similar case, we will say that the case is unlike this, in that in this case the plaintiff was not limited or restricted to any particular land. It was not an undertaking to sell and deliver part of a specific crop, but a general undertaking to raise, sell, and deliver the specified quantity of beans. We have been cited to and found no case holding that, where one agrees generally to produce, by manufacture or otherwise, a particular thing, performance being possible in the nature of things, he may be excused from performance by the destruction, before completion or delivery, of the thing, from whatever cause, except the act of the other party. Applications of the general rule, where the thing agreed to be produced was, before completion, destroyed without the party's fault, are furnished in Adams v. Nichols, 19 Pick. 275, 279; School Dist. v. Dauchy, 25 Conn. 530; and Trustees v. Bennett, 27 N. J. Law, 513, approved and followed in Stees v. Leonard, 20 Minn. 494 (Gil. 448). Where such causes may intervene to prevent a party performing, he should guard against them in his contract.

Order reversed.

9 Cyc. 627–629 (66–78); 14 L. R. A. 217; W. P. 528 (10); 539 (22); 15 H. L. R. 63, 418; 20 H. L. R. 413; 11 C. L. R. 83; Woodward, Impossibility of performance as excuse for breach of contract, 1 C. L. R. 529.

Exceptions.

(i.) Legal impossibility.

CORDES *v.* MILLER.

39 MICHIGAN, 581.—1878.

Assumpsit on covenant in a lease. Defendant brings error.

COOLEY, J. Miller, on the fourth day of October, 1872, rented of Cordes, for the term of ten years, a wooden building in Grand Rapids, at a specified annual rent. The lease contained a covenant on the part of Cordes that "if said building burns down during this lease, said Cordes agrees to rebuild the same in a suitable time, for said Miller." Miller went into possession and occupied the building for a restaurant and saloon until May 26, 1874, when it was destroyed by fire. Within a week Miller notified Cordes to rebuild, and some preparation to do so would appear to have been made by the removal of the débris of the fire. June 15, 1874, the common council of Grand Rapids passed an ordinance prohibiting the erection of wooden buildings within certain limits which embraced the site where the burned building had stood. Cordes afterwards went on and prepared plans and specifications for a larger brick building, and contracted for putting it up. Miller declined to examine the plans or to say anything about them, but in substance he said that when the building was completed he would move into it. It was completed in November, and in December Miller moved into a part of it, which was considered by the parties as being equivalent to the old building. Complaining then that the new building was not put up in a suitable time, he brought this suit on the covenant.

The principal question in the case is whether such a suit can be maintained. No question is made of the validity of the city ordinance, and it is urged on behalf of the lessor that as the putting up of such a structure as was originally leased was thereby rendered impossible, the covenant was discharged. Brady v. Insurance Co., 11 Mich. 425. On the other hand, it is argued that rebuilding is not impossible; it is only rebuilding of a specified material that is forbidden; and that Cordes, when he rented his building and agreed to rebuild in case of fire, took upon himself all the risks of being compelled to make use of some other material than wood, as much as he did the risk of the rise in the cost of materials. Some stress is also laid upon the fact that the lease did not mention the material of which the old building was constructed. The court below sustained the action.

If this judgment is correct, then Cordes had placed himself under legal obligation not only to put up a new building of some more substantial material than wood, no matter how much greater might be

the cost, and to turn it over to Miller for the term at the same rent, no matter how much more the occupation might be worth. Moreover, he would be obliged to reproduce the old building, as near as the change in material would permit, and could not compel his lessee to accept a building differently planned, subdivided, and arranged, even though it might be better and at least equally convenient. In other words, in the enforced change of material Cordes could not consult his own interest in making such modifications as the change would be likely to render important and desirable, but would be tied down to the plan and arrangement of a building which it might be well enough to reproduce in the old material, but which would never be chosen if the material were to be brick, stone, or iron.

We cannot think this the fair construction of the lease. Cordes covenanted to rebuild, if destroyed by fire, the building he leased; but did not covenant that if not allowed to rebuild that, he would put up another on the same plan, of more substantial and presumably more costly material. Had the exact contingency which has since happened been in the minds of the parties at the time, it is scarcely conceivable that the lessor would have consented to put up a brick building in the place of the one leased, and to receive for it the same rent the wood building brought him, when its probable rental value would be considerably greater, and its cost presumably more.

Had this been an agreement by a builder to rebuild the old building, it would scarcely be urged that the covenant would bind him to erect a new one differing from it so radically as would a brick or a stone structure from one of wood. Had Cordes been selling this land to Miller with a similar agreement respecting the building, it would be equally plain that the change in the law could not work a change in his contract so seriously increasing his responsibility. But in principle the cases suggested would not differ from this in the least. Cordes undertook for something which by a change in the law has become illegal; and his covenant has thereby been discharged.

In this case Cordes prepared accommodations for Miller which the latter has accepted and now occupies. But they were different from the old, and Miller could not have been compelled to accept them. The arrangement was therefore one outside the lease,—not one in compliance with its terms. Probably the course of the parties has in effect been equivalent to an offer on one side and an acceptance on the other of the new quarters in place of the old and under the old lease; but no question concerning that arrangement arises here.

The judgment must be reversed, and judgment entered for Cordes with costs of both courts.

The other justices concurred.

9 Cyc. 630 (79–80, 84); W. P. 514 (79); 529 (11); 12 H. L. R. 501; 16 H. L. R. 64; 18 H. L. R. 64; 5 C. L. R. 243.

HUGHES *v.* WAMSUTTA MILLS.

11 ALLEN (MASS.), 201.—1865.

Contract for work. Verdict for plaintiff.

Plaintiff agreed that if he left without giving two weeks' notice he should receive nothing for wages due. He was arrested and convicted of a crime and sentenced to jail. The damage to defendant from want of notice was greater than the wages due.

BIGELOW, C. J. The question at issue between the parties to this suit depends entirely on the construction of the contract under which the plaintiff was employed. This, we think, is misapprehended by the counsel for the defendants. The interpretation which he seeks to put on the stipulation that the plaintiff was to receive no wages if he left defendants' service without giving two weeks' previous notice of his intention so to do, is inconsistent with the terms of the stipulation, and too narrow to be a fair or reasonable exposition of the intention of the parties. The stipulation clearly had reference only to a voluntary abandonment of the defendants' employment, and not one caused *vi majore,* whether by the visitation of God or other controlling circumstances. Clearly the abandonment must have been such that the plaintiff could have foreseen it; he could give notice only of such departure as he could anticipate, and the stipulation that he was to have the privilege of leaving after giving two weeks' notice without forfeiting his wages implied that the forfeiture was to take place only when it would be within his power to give the requisite notice. It certainly cannot be contended that the stipulation was absolute; that he was to receive no wages in case of leaving without notice, whatever may have been the cause of his abandonment of the service. It is settled that absence from sickness or other visitation of God would not work a forfeiture of wages under such a contract. Fuller v. Brown, 11 Met. 440. *Pari ratione,* any abandonment caused by unforeseen circumstances or events, and which at the time of their occurrence the person employed could not control or prevent from operating to terminate his employment, ought not to operate to cause a forfeiture of wages.

It may be said that in the case at bar the commission of the offense for which the plaintiff was arrested was his voluntary act, and that the consequences which followed after it and led to his compulsory departure from the defendants' service are therefore to be regarded as bringing this case within the category of a voluntary abandonment of his employment. But the difficulty with this argument is, that it confounds remote with proximate causes. The same argument might be used in case of inability to continue in service occasioned by sickness or severe bodily injury. It might be shown in such a case

that some voluntary act of imprudence or carelessness led directly to the physical consequences which disabled a party from continuing his service under a contract. The true and reasonable rule of interpretation to be applied to such contracts is this: To work a forfeiture of wages, the abandonment of the employer's service must be the direct, voluntary act, or the natural and necessary consequence of some voluntary act of the person employed, or the result of some act committed by him with a design to terminate the contract or employment, or render its further prosecution impossible. But a forfeiture of wages is not incurred where the abandonment is immediately caused by acts or occurrences not foreseen or anticipated, over which the person employed had no control, and the natural and necessary consequence of which was not to cause the termination of the employment of a party under a contract for services or labor.

It results from these views that the plaintiff has not forfeited his wages by any breach of his contract, and that he is entitled to recover the full amount due to him for services, without any deduction for damages alleged to have been suffered by the defendants in consequence of his sudden departure from their employment.

Judgment on the verdict.[1]

9 Cyc. 631 (87); W. P. 545 (32).

(*ii.*) *Destruction of subject matter.*

DEXTER *v.* NORTON *et al.*

47 NEW YORK, 62.—1871.

Appeal from a judgment entered upon an order of the General Term of the Supreme Court in the first judicial district, overruling plaintiff's exceptions, and directing judgment dismissing the complaint, in accordance with ruling of the court at circuit.

[1] Where a registered policy life insurance company which has entered into a contract with a general agent for his services for a specified term at a stipulated salary, before any breach of the contract on its part, is restrained from further prosecuting its business or exercising its corporate franchises by order of the court, and a receiver of its assets is appointed in proceedings under the insurance law (§ 7, Chap. 902, Laws of 1869), the agent has no valid claim upon the fund in the hands of the receiver for damages for alleged breach of the contract, because of the discontinuance of the employment; at least, in the absence of evidence that it was some fault of the company which induced the superintendent of the insurance department to make the certificate upon which the attorney-general acted. There is, in such case, no breach on the part of the company as performance is prevented, and the contract dissolved by the action of the State.—People v. Globe Mut. Ins. Co., 91 N. Y. 174. (Syllabus.) See 9 Cyc. 630 (80); 631 (88); W. P. 534 (17); 548 (34).

This action is brought to recover damages for a breach of a contract to sell and deliver cotton. Defendants, on the 5th day of October, 1865, at the city of New York, agreed to sell and deliver to the plaintiff 607 bales of cotton, bearing certain marks and numbers, specified in the contract, at the price of forty-nine cents per pound, and fourteen bales, bearing marks and numbers, specified in the written contract, at the price of forty-three cents per pound, the cotton to be paid for on delivery. Defendants delivered to the plaintiff 460 bales of the said cotton, the remaining 161 bales were accidentally destroyed by fire without fault or negligence of the defendants. Cotton rose in value after the sale, and plaintiff claimed to recover the increase on the 161 bales. The court dismissed the complaint, upon the ground that a fulfillment of the contract by the sellers had become impossible by the destruction, without their fault, of the subject matter of the sale, and they were, therefore, excused from the obligation to perform their agreement. Plaintiff excepted.

CHURCH, C. J. The contract was for the sale and delivery of specific articles of personal property. Each bale sold was designated by a particular mark, and there is nothing in the case to show that these marks were used merely to distinguish the general kind or quality of the article, but they seem to have been used to describe the particular bales of cotton then in possession of the defendant. Nor does it appear that there were other bales of cotton in the market of the same kind, and marked in the same way. The plaintiff would not have been obliged to accept any other cotton than the bales specified in the bought note.

The contract was executory, and various things remained to be done to the 161 bales in question by the sellers before delivery. The title, therefore, did not pass to the vendee, but remained in the vendor. Joyce v. Adams, 8 N. Y. 291.

This action was brought by the purchaser against the vendor to recover damages for the non-delivery of the cotton, and the important and only question in the case is, whether upon an agreement for the sale and delivery of specific articles of personal property, under circumstances where the title to the property does not vest in the vendee, and the property is destroyed by an accidental fire before delivery without the fault of the seller, the latter is liable upon the contract for damages sustained by the purchaser.

The general rule on this subject is well established, that where the performance of a duty or charge created by law is prevented by inevitable accident without the fault of the party he will be excused, but where a person absolutely contracts to do a certain thing not impossible or unlawful at the time, he will not be excused from the obligations of the contract unless the performance is made unlawful, or is prevented by the other party.

Neither inevitable accident, nor even those events denominated acts of God will excuse him, and the reason given is that he might have provided against them by his contract. Paradine v. Jane, Aleyn, 27; Harmony v. Bingham, 12 N. Y. 99; Tompkins v. Dudley, 25 N. Y. 272.

But there are a variety of cases where the courts have implied a condition in the contract itself, the effect of which was to relieve the party when the performance had, without his fault, become impossible; and the apparent confusion in the authorities has grown out of the difficulty in determining in a given case whether the implication of a condition should be applied or not, and also in some cases in placing the decision upon a wrong basis. The relief afforded to the party in the cases referred to is not based upon exceptions to the general rule, but upon the construction of the contract.

For instance, in the case of an absolute promise to marry, the death of either party discharges the contract, because it is inferred or presumed that the contract was made upon the condition that both parties should live.

So of a contract made by a painter to paint a picture, or an author to compose a work, or an apprentice to serve his master a specified number of years, or in any contract for personal services dependent upon the life of the individual making it, the contract is discharged upon the death of the party, in accordance with the condition of continued existence, raised by implication. 2 Smith's Leading Cases, 50.

The same rule has been laid down as to property: "As if A agrees to sell and deliver his horse Eclipse to B on a fixed future day, and the horse die in the interval, the obligation is at an end." Benjamin on Sales, 424. In replevin for a horse, and judgment of *retorno habendo,* the death of the horse was held a good plea in an action upon the bond. 12 Wend. 589. In Taylor v. Caldwell (113 E. C. L. R. 824) A agreed with B to give him the use of a music hall on specified days, for the purpose of holding concerts, and before the time arrived the building was accidentally burned; held, that both parties were discharged from the contract. Blackburn, J., at the close of his opinion, lays down the rule as follows: "The principle seems to us to be, that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance, arising from the perishing of the person or thing, shall excuse the performance." And the reason given for the rule is, "because from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the particular person or thing."

In School District No. 1 v. Dauchy (25 Conn. 530) the defendant had agreed to build a school-house by the first of May, and had it

nearly completed on the twenty-seventh of April, when it was struck by lightning and burned; and it was held, that he was liable in damages for the non-performance of the contract. But the court, while enforcing that general rule in a case of evident hardship, recognizes the rule of an implied condition in case of the destruction of the specific subject matter of the contract; and this is the rule of the civil law. Pothier on Contracts and Sale, art. 4, § 1, p. 31.

We were referred to no authority against this rule. But the learned counsel for the appellant, in his very able and forcible argument, insisted that the general rule should be applied in this case. While it is difficult to trace a clear distinction between this case and those where no condition has been implied, the tendency of the authorities, so far as they go, recognizes such a distinction, and it is based upon the presumption that the parties contemplated the continued existence of the subject matter of the contract.

The circumstances of this case are favorable to the plaintiff. The property was merchandise sold in the market. The defendant could, and from the usual course of business, we may infer, did protect himself by insurance; but in establishing rules of liability in commercial transactions, it is far more important that they should be uniform and certain than it is to work out equity in a given case. There is no hardship in placing the parties (especially the buyer) in the position they were in before the contract was made. The buyer can only lose the profits of the purchase; the seller may lose the whole contract price, and if his liability for non-delivery should be established, the enhanced value of the property. After considerable reflection, I am of the opinion that the rule here indicated of an implied condition in case of the destruction of the property bargained, without fault of the party, will operate to carry out the intention of the parties under most circumstances, and will be more just than the contrary rule. The buyer can of course always protect himself against the effect of the implied condition, by a provision in the contract that the property shall be at the risk of the seller.

Upon the grounds upon which this rule is based of an implied condition, it can make no difference whether the property was destroyed by an inevitable accident, or by an act of God, the condition being that the property shall continue to exist. If we were creating an exception to the general rule of liability, there would be force in the considerations urged upon the argument, to limit the exception to cases where the property was destroyed by the act of God, upon grounds of public policy, but they are not material in adopting a rule for the construction of the contract so as to imply a condition that the property was to continue in existence. It can make no difference how it was destroyed, so long as the party was not in any degree in fault. The minds of the parties are presumed to have contemplated

the possible destruction of the property, and not the manner of its destruction; and the supposed temptation and facility of the seller to destroy the property himself, cannot legitimately operate to affect the principle involved.

The judgment must be affirmed.

Allen, Grover, and Rapallo, JJ., concur; Peckham and Folger, JJ., dissent.

Judgment affirmed.[1]

9 Cyc. 631 (94-95); W. P. 559 (51).

[1] In Clarksville Land Co. v. Harriman, 68 N. H. 374, the facts were that in the spring of 1881 the defendant had a large quantity of logs on the branches of Hall stream, ready to be driven down the stream. At this time the plaintiffs entered into an agreement with him to drive the logs down the stream to the Connecticut river. Although it is not found in express terms that the contract was to be performed that spring, yet such appears to have been the understanding of the parties. Shortly afterwards, and before the plaintiffs had a reasonable time in which to complete their contract, notwithstanding the fact that they used due diligence, the water in the stream suddenly fell, and remained so low that the further performance of the contract that spring was rendered impossible. The question was whether this was an excuse for the non-performance of the contract on the part of the plaintiff. The court held that, "the contract was made on the basis of the continued existence of sufficient water to render its performance possible. The plaintiffs, being without fault, and having exercised due diligence in the performance of their contract, were excused from its further performance by the failure of the water."

In Stewart v. Stone, 127 N. Y. 500, the court said: "By the contract now under consideration, the cheese and butter were to be manufactured at this factory, and to be made from the milk furnished by the patrons, of whom the plaintiff and his assignors were members. The existence of that particular factory was terminated by its destruction, and the loss with it of the manufactured product and of the milk then remaining there unconverted into cheese and butter rendered it impossible for the defendant to further proceed with the performance of his contract in respect to those articles of material and product. And as the nature of the agreement was such that it must be deemed to have been contemplated by the parties to it, that the articles to be manufactured should be made only from the materials furnished by the patrons and at the factory referred to, there was necessarily an implied condition so qualifying the defendant's undertaking, as to relieve him from performance rendered impossible without his fault, and from the consequences of his inability thus occasioned to fulfil his contract in respect to the subject of the bailment which was destroyed by the fire."

In Buffalo and Lancaster Land Co. v. Bellevue Land and Improvement Co., 165 N. Y. 247, it was held that an agreement by the vendor of land, as a part of the consideration of its sale, to construct an electric street railroad upon the property and to run cars thereon "as often as once every half hour from 7 A. M. to 8 P. M. each day, as such street railroads are usually run" is not violated, so as to entitle the purchasers to rescind the contract, by the fact that on certain days during a winter of unusual severity there was a failure to run cars at the times named on account of heavy snows, the interruptions not being due to any omission on the part of the vendor, which operated the road on the days in question as similar roads in the

WILMINGTON TRANSPORTATION CO. *v.* O'NEIL.

98 CALIFORNIA, 1.—1893.

Action on contract. Defense, impossibility of performance. Judgement for plaintiff. Defendant appeals.

Defendant chartered plaintiff's boat, covenanting to return the same in good condition, and should it "be lost or damaged to the extent that it cannot be put in the same good condition as when received . . to pay . . . the sum of $3500" for the same. The boat was lost in a storm without negligence on the part of defendant.

VAN CLIEF, C. . . . The defendant appeals from the judgment and contends: 1. That the answer raised a material issue as to whether the lighter was lost by inevitable accident; 2. That the sum to be paid ($3500) in case the lighter should be lost or damaged, etc., was not intended to be fixed or liquidated damages, and that such intention does not appear from the agreement properly construed; and 3. That if the sum of $3500 was intended as liquidated damages, the agreement, to that extent, is made void by sections 1670 and 1671 of the Civil Code.

I think the first point cannot be sustained by the authorities. The defendant expressly promised to pay in case the lighter should be lost, without any provision or qualification in the contract as to the manner or cause of such loss. Where a party has expressly undertaken, without any qualification, to do anything not naturally or necessarily impossible under all circumstances, and does not do it, he must make compensation in damages, though the performance was rendered impracticable, or even impossible, by some unforeseen cause over which he had no control, but against which he might have provided in his contract. Wharton on Contracts, §§ 311, 314, and authorities there cited, particularly School District v. Dauchy, 25 Conn. 530; 68 Am. Dec. 371; Harmony v. Bingham, 12 N. Y. 99; 62 Am. Dec. 142; Tompkins v. Dudley, 25 N. Y. 272; 82 Am. Dec. 349. It is to be observed, however, that the contract here is not merely to return, or to redeliver the lighter to plaintiff, but also to pay $3500 in case the lighter should be lost; and that there is no pretense that such payment has been rendered impossible or impracticable by any cause; so that the alleged *casus* can apply only to the promise to redeliver the lighter, while the action is based solely

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vicinity were operated; the court saying that "there are many contracts from which by their very nature a condition may be implied that a party will be relieved from the consequences of non-performance in some slight particular, where the obligation is qualified, or when performance is rendered impossible without his fault, and we think the contract in question belonged to that class."

upon the alleged breach of the promise to pay in case the lighter should be lost.

If I am not mistaken in this view of the nature of the case, the issue as to the cause of the loss is wholly immaterial. The possibility of a loss was foreseen and provided for in the agreement, whereby the defendant unqualifiedly obligated himself to pay in the event of a loss from any cause; and the only qualification or limitation of this obligation by the law is that it would not bind the defendant in case the loss had been caused by the culpable negligence or other wrongful act of the plaintiff, of which there is no pretense.

[On the second and third points the court decides in favor of the defendant.]

I therefore conclude that the judgment should be reversed and the cause remanded for a new trial, with leave to the parties to amend their pleadings if so advised.

For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded for a new trial, with leave to the parties to amend their pleadings if so advised.[1]

9 Cyc. 625 (52); 627 (66).

[1] In Drake v. White, 117 Mass. 10, the action was upon the following agreement, signed by the defendants: "Boston, October 22d, 1872. Received of John E. Drake one Morris & Ireland fireproof safe, which we promise to deliver the same to said Drake, or its equivalent in money, on payment of a certain note signed by said Drake, dated October 22d, 1872, payable in four months from date, for the sum of $276.68." The plaintiff paid his note at maturity, and made a demand for the safe, before bringing this action. The safe was destroyed by the fire of November 9th, 1872, and there was no evidence of negligence or want of due care upon the part of the defendants. The court said: "The parties have reduced their contract to writing, and have omitted to attach to the defendants' liability for the property any limitation whatever. On the contrary, their express promise is to do one or the other of two things: either to return the property specifically, or to pay for it in money. There can be no doubt that if a creditor sees fit to accept a deposit of security upon such terms, and to place himself in the position of an insurer of its safety, he can legally do so. It is not difficult to suppose a case in which the parties might find it convenient that the business of guarding against the risk of fire or other accident should be attended to by the depositary. But however that may be, the proper interpretation of the contract is to be determined by the general rules of construction recognized by the law; and if the parties have improvidently made their contract more onerous than they expected, the difficulty cannot be removed by a violation of those rules."

ANGUS *v.* SCULLY.

176 MASSACHUSETTS, 357.—1900.

Action by one Angus and others against one Scully to recover for services performed in moving a building. From a judgment in favor of plaintiffs, defendant excepts. Exceptions overruled.

HAMMOND, J. The contract was that the plaintiffs should move a large building belonging to the defendants from a lot on Third Street to a lot on First Street, and also change the location of two other buildings, of which one was on the First Street lot, and one on the Third Street lot; and the defendant was to pay the $840. In accordance with the agreement, the plaintiffs began the work. "They first moved the house on the Third Street lot, and then began to move the large building from the Third Street lot across certain open lots toward the lot on First Street. When said last-named building had been moved about half the distance to said lot on First Street it was entirely consumed by fire at some time during the night, and thereupon, with the assent of the defendant, no further work was done in moving either of the other buildings."

In this action the plaintiffs seek to recover the fair value of the services rendered by them in the work done down to the time of the fire. The court refused to rule as requested by the defendant, that the plaintiffs could not recover, and submitted the case to the jury upon instructions which would authorize them to find for the plaintiffs if they were satisfied that the fire was not attributable to any negligence of the plaintiffs. We see no error in the rulings under which the case thus went to the jury. Clearly, one of the implied conditions of the contract was that the building should continue to exist. Upon the destruction of the building, the work could not be completed according to the contract.

Authorities differ as to the rights of the parties in such a case, but so far as respects this commonwealth the rule is well settled. As stated by Knowlton, J., in Butterfield v. Byron (153 Mass. 517, 523) "the principle seems to be that when, under an implied contract, the parties are to be excused from performance if a certain event happens, and by reason of the happening of the event it becomes impossible to do that which was contemplated by the contract, there is an implied assumpsit for what has properly been done by either of them; the law dealing with it as done at the request of the other, and creating a liability to pay for its value, to be determined by the price stipulated in the contract, or in some other way if the contract price cannot be made applicable." Stated more narrowly, and with particular reference to the circumstances of this case, the rule may be said to be that where one is to make repairs or do any other work

on the house of another under a special contract, and his contract becomes impossible of performance on account of the destruction of the house without any fault on his part, then he may recover for what he has done. This case comes clearly within this rule. Lord v. Wheeler, 1 Gray, 282; Butterfield v. Byron, *ubi supra,* and cases therein cited.

Exceptions overruled.[1]

6 Cyc. 80 (8-9); W. P. 537 (21).

SIEGEL, COOPER & CO. *v.* THE EATON & PRINCE CO.

165 ILLINOIS, 550.—1897.

Action by the Eaton & Prince Company against Siegel, Cooper & Co. There was a judgment for plaintiff, which was affirmed by the appellate court (60 Ill. App. 639), and defendant appeals.

This is an action by appellee against appellant, to recover money due appellee under a contract to construct an elevator in a building belonging to appellant, which was destroyed during the progress of the work. The whole contract price was $2500, payable as the work progressed, as follows: "One-half when engine is on foundation and final payment to be due and payable when the elevator is put up in good running order." The first count of the declaration, which is in assumpsit, sets up the contract, and alleges that the engine mentioned therein was on the foundation prior to the fire, and claimed a right to recover $1250 by the terms of the contract. The second count also set up the contract, and alleged the performance of work and furnishing materials by plaintiff, of the value of $2000, when, without its fault, the building was destroyed. The plea is the general issue. The cause was tried on the following stipulation:

"It is hereby stipulated and agreed that the plaintiff and defendants entered into the contract on the first day of June, 1891; that under the said contract, the plaintiff on the first day of August, 1891, had the engine mentioned therein on its foundation, but not leveled nor fastened to said foundation, and had prepared material and done labor under said contract to the total value of $1390; that neither the cabs, the cage, nor the cable for same was on said premises at the time the premises of Siegel, Cooper & Co., were destroyed by fire; that the engine had been placed on the foundation as aforesaid about six o'clock on Saturday afternoon, August 1, 1891; that fire destroyed the premises of Siegel, Cooper & Co., in which said elevator and machinery therefor under said contract was to be placed, and

[1] In Niblo v. Binsse, 3 Abb. App. Dec. (N. Y.) 375, recovery for the part performed is allowed, but upon the ground that defendant impliedly contracts to keep the building in existence.

broke out about 7:30 o'clock on Monday morning, August 3, 1891; that all work to be done under the contract had not been performed when the premises were destroyed by fire; that the premises were destroyed by fire without the fault of either party to the contract, and nothing had been paid to the Eaton & Prince Co. by Siegel, Cooper & Co. under or upon said contract; that defendant had the hatchways ready for the elevator work on July 10, 1891, and plaintiff had the uninterrupted use of the hatchways on and after said date. It is further stipulated that the jury in this case shall be waived and the same submitted to the court for trial, without a jury."

The plaintiff recovered judgment for $1390, the full value of material furnished and labor done. That judgment has been affirmed by the appellate court.

The trial court held the following propositions in the decision of the case:

"The court holds, as a matter of law, that if the plaintiff made and entered into the contract in evidence with the defendant, for the construction of an elevator and appurtenances as set forth in said contract; that work under said contract had so far progressed that the engine thereof had been placed upon its foundation; and that afterwards, and without fault on the part of the plaintiff, the building in which said elevator, with its appurtenances, etc., was to be placed or constructed, was on or about August 1, 1891, destroyed by fire,—then the plaintiff was excused from further compliance with said contract, and is entitled to recover of and from the defendant the sum of $1250, with interest thereon at the rate of five per cent per annum, from said August 1, 1891."

"And the court further holds that if the plaintiff set about the performance of said contract, and prepared material and machinery in accordance with the terms of said contract, and delivered a part thereof to the building in which said elevator and its appurtenances was to be constructed or built, and that afterwards, and on or about the first day of August, 1891, the said building in which said elevator was being constructed was destroyed by fire, without the fault of the plaintiff, then, as a matter of law, the plaintiff is entitled to recover of and from the defendant the full value, to be determined by the evidence or stipulation of the parties, of all work done and material prepared and delivered to said building, pursuant to said contract, prior to the happening of the fire."

WILKIN, J. It is insisted that the court erred in holding these propositions, and in refusing counter propositions asked by the appellant, its contention being that the contract is an entire one, and the building in which the elevator was to be placed having been destroyed by fire before the time for final payment, without any fault of either party, no recovery for the work done or materials furnished could be

had. As will be seen from plaintiff's declaration, it proceeds on two theories: First, that the contract was not an entire one, so far as the payments were concerned; and, second, even if it was, under the law it was entitled to recover the value of the work done and materials furnished prior to the destruction of the building. The judgment is upon this last theory, and is based upon the law as stated in the second of the above propositions. The theory upon which this proposition is based is that, under the contract requiring the elevator to be placed in a particular building, it was the duty of defendant to furnish and provide that building, and therefore it is liable, even though the destruction was without its fault. The rule of law, as we understand it, is otherwise. Thus, in Add. Cont., p. 401, it is said: "Where a man contracts to expend materials and labor on buildings belonging to and in the occupation of the employer, to be paid for on completion of the whole, and before completion the buildings are destroyed by accidental fire, the contractor is excused from completing the work, but is not entitled to any compensation for the work already done, which perished without any default of the employer." This doctrine is sustained by Brumby v. Smith, 3 Ala. 123; Lord v. Wheeler, 1 Gray. 282; Guilleu v. Toudy, 5 Wkly. Notes Cas. 528. The rule seems to be adduced from the case of Appleby v. Myers, L. R. 2 C. P. 651. In that case the action was to recover for a part performance of a contract to furnish and attach to a building of the defendant certain machinery, to be paid for upon the completion of the work. The premises, together with part of plaintiff's materials, were destroyed by fire before the contract was completed. It was held that there was no right of action, the court saying: "We think when, as in the present case, the premises are destroyed without fault on either side, it is a misfortune equally affecting both parties, excusing both from further performance of the contract, by giving a cause of action to neither." See Bish. Cont., § 588.

It is insisted by counsel for appellee—and the decision of the appellate court is in conformity with that contention—that a different rule is announced in Cleary v. Sohier, 120 Mass. 210, and Rawson v. Clark, 70 Ill. 656. We do not so understand either of these cases. The Massachusetts case was upon an oral contract to lath and plaster a certain building at a certain price per square yard. *"No agreement was made and nothing was said, as to terms or times of payment,* but only that the work was to be done for forty cents per yard." A certain part of the work being done, the building was destroyed, without the fault of either party. The amount claimed by plaintiff was $474, the reasonable value of the work done. All that is said by the court in the decision of the case is: "The building having been destroyed by fire without the fault of the plaintiff, so that he could not complete his contract, he may recover under a count for work

done and materials furnished;" citing Lord v. Wheeler, *supra,* and Wells v. Calnan, 107 Mass. 514. This in no way conflicts with Appleby v. Myers, *supra,* for it was said in that case: "It is quite true that materials worked by one into the property of another become a part of that property. This is equally true, whether it be fixed or movable property. Bricks built into a wall become part of the house. Thread stitched into a coat which is under repair, or planks and nails and pitch worked into a ship under repair, become part of the coat or the ship; and therefore, generally, and in the absence of something to show a contrary intention, the bricklayer or tailor or shipwright is to be paid for the work and materials he has done and provided, although the whole work is not complete. It is not material whether in such case the noncompletion is because the shipwright did not choose to go on with the work (as was the case in Roberts v. Havelock, 3 Barn. & Adol. 404), or because, in consequence of a fire, he could not go on with it (as in Menetone v. Athawes, 3 Burrows, 1592). But, though this is the *prima facie* contract between those who enter into contracts for doing work and supplying materials, there is nothing to render it illegal or absurd in the workman to agree to complete the whole, and to be paid when the whole is complete, and not till then; and we think the plaintiffs in the present case had entered into such a contract."

The case of Rawson v. Clark has no bearing whatever upon the case. There the plaintiff agreed to "manufacture and place in the building" certain iron work, for a certain price, 85 per cent of which was to be paid on the certificate of the architect as the work progressed, and the balance, 15 per cent, when the work was completed. The suit was for the iron work which had been manufactured. The evidence showed that the price agreed upon for manufacturing the iron was $206, and for putting it up about $75. Upon the completion of the manufacturing of the iron, and the delivery of a small portion of it, the defendant notified the plaintiff that the building was not ready for the work, and directed him to send no more until it should be ready, promising to notify him when that time arrived. A week later the building was destroyed by fire. The time required to put up the work would have been about two days; so that it clearly appeared in that case that the plaintiff was prevented from completing the work, not by the destruction of the building by fire, but because the defendant did not have it ready for the work when plaintiff offered to complete it, and hence we said: "Appellees were in no way in default. They were ready and offered to fully perform within the time limited, but were prevented by appellant. The reason of their not entirely completing their contract, by placing the iron work in the building, was the default of the defendant, in not having a building provided for the purpose." This, certainly, does not mean that they were in default

in not having a building because it was finally destroyed by fire, but because the building "was not then ready for the work," etc.

We think the law is that where a contract is entered into with reference to the existence of a particular thing, and that thing is destroyed before the time for the performance of the contract, without the fault of either party, both parties are excused from performing the contract, but neither is entitled to recover any thing for a part performance thereof.

It remains, however, to be determined whether this contract is an entire contract within that rule. It will be seen that by its terms payment was to be made, not upon the completion of the work, but "as the work progresses, as follows: One-half when the engine is on foundation, and final payment to be due and payable when the elevator is put up in good running order;" thus clearly providing for payment by installments. Counsel insist, however, that this does not destroy the entirety of the contract, because they say the $1250 was a mere arbitrary sum, fixed without reference to the value of the work done at the time designated for its payment; and that the phrase "when the engine is on foundation" merely named an arbitrary time at which a partial payment should be made, without reference to the value of the work and material furnished at that time; and that the payment of the installment in that manner was merely for the convenience of the contractor, and as an evidence of the good faith of Siegel, Cooper & Co. in completing its part of the contract by making the payment. If all this were true, we are unable to see why the contract is not severable, so far as the payments are concerned. But we do not think the contract is fairly susceptible of that construction. The $1250 is not a mere arbitrary sum, fixed without reference to the value of the work done at the time of paying the installment. Payment was to be made as the work progressed, one-half when the engine was on the foundation. The parties here fixed the sum, by agreement, which should be paid when the work had progressed thus far, and presumably with reference to the value of the material and labor then placed in the defendant's building. That it served the convenience of the contractor, and evidenced the good faith of the employer, in no way affects the case.

Parsons, in his work on Contracts (6th ed., vol. 2, § 517), speaking of the entirety of contracts, says: "If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable; and the same rule holds where the price to be paid is clearly and distinctly apportioned to different parts of what is to be performed, although the latter is in its nature single and entire." See note C to the same section.

In Schwartz v. Saunders (46 Ill. 18), Saunders made a contract with Schwartz to do the carpenter work, and furnish the material therefor on a brick building being erected, to be paid for as the work progressed, upon estimates to be furnished by the architect. The building was blown down, after an estimate of certain carpenter work, and before the contract was completed; and it was held that the contractor, under such circumstances, was justified in abandoning the contract, and entitled to a mechanic's lien for the work done. It was contended there, as here, that the destruction of the building absolved both parties, and protected the defendant from any action for the work done, the case of Appleby v. Myers, *supra,* being relied upon to support the contention, but it was said of the Appleby Case: "This case we have examined, and, from the statement of it, it would appear the contract was unlike the one between these parties, which provides, in terms, that 85 per cent of the work estimated by the architect should be paid as the work progressed, whilst, in the case cited, no payment was to be made until the work was completed, and, as it was not completed, the mechanic could not recover for the work he had done." It is true that there are distinguishing features between that case and this, prominent among which is the fact that there the defendant had positively refused to pay the architect's estimate of the work done before the destruction of the building, and afterwards refused to pay the same, insisting that, to entitle him to pay therefor, he was bound to replace the work destroyed without any compensation, and the plaintiff's right to abandon the work was placed partly upon the refusal to pay and the unjust demand, as well as the destruction of the building. But the case does not hold that where, by the terms of a contract of this character, payment is to be made as the work progresses, the doctrine announced in Appleby v. Myers has no application.

We think the appellate court properly ruled that plaintiff was entitled to recover under the first count of the declaration, but we are unable to find authority or satisfactory reason upon which to sustain the second. The language "payment to be made as the work progresses" cannot, we think, be considered to mean more than that the $1250 should be paid as stated; that is, it cannot be construed to mean that the payments, after the engine was on foundation, should be made as the work progressed, it being expressly stated, "Final payment to be due and payable when the elevator is put up in good running order,"—that is, when the work was complete. Therefore, on a proper construction of the contract, the second proposition should have been refused. There was, however, no error in the judgment of the trial court, because under the first proposition, which, as we have seen, was properly held, the plaintiff was entitled to recover the $1250, with 5 per cent interest thereon from August 1,

1891, to the date of the judgment, July 5, 1895, which amounted to considerable more than the $1390 recovered. The judgment below will be affirmed.

Judgment affirmed.

Phillips and Cartwright, JJ., dissenting.

(*iii.*) *Death or disability of a party in contract for personal service.*

SPALDING *et al v.* ROSA *et al.*

71 NEW YORK, 40.—1877.

Appeal from judgment of the General Term of the Supreme Court, in the third judicial department, in favor of defendants, entered upon an order overruling exceptions and directing a judgment upon an order on trial dismissing plaintiffs' complaint.

This action was brought by plaintiffs, who were the owners and managers of the Olympic Theater, in St. Louis, to recover damages for an alleged breach of contract by defendants. By the contract, defendants agreed to furnish the "Wachtel Opera Troupe," to give four performances per week at plaintiffs' theater for two weeks, commencing the 26th or 27th February, 1872, plaintiffs to receive twenty per cent of the gross receipts, up to $1800 per week, and defendants the balance. Prior to the time specified in the contract, Wachtel, who was the chief singer and attraction, and who gave the name to the troupe, was taken sick, and at the time was unable to sing. Defendants in consequence did not furnish the troupe at the time specified.

The court at the close of the evidence directed a dismissal of the complaint, to which plaintiffs' counsel duly excepted. Exceptions were ordered to be heard at first instance at General Term.

ALLEN, J. The contract of the defendants was for four performances per week for two weeks, commencing on the 26th or 27th of February, 1872, by the "Wachtel Opera Troupe," at the plaintiffs' theater in St. Louis.

The "Wachtel Opera Troupe" was well known by its name as the company at the time of making the contract, performing in operas, under temporary engagements, at the principal theaters and opera-houses in the larger cities of the United States, and composed of Wachtel as the leader and chief attraction, and from whom the company took its name, and those associated with him in different capacities, and taking the different parts in the operatic exhibitions for which they were engaged. The proof of the fact that there was a troupe or company known by that name, was competent, as showing what particular company was in the minds of the contracting parties,

and intended, by the terms used, and as there was no controversy upon this subject, and no ambiguity arising out of the extrinsic evidence, there was no question of fact for the jury.

Wachtel had acquired a reputation in this country, as well as in Europe, as a tenor singer of superior excellence; and, in the language of the witnesses, had made a "decided hit" in his professional performances here. It was his name and capabilities that gave character to the company, and constituted its chief attraction to connoisseurs and lovers of music, filling the houses in which he appeared. His connection with the company was the inducement to the plaintiffs to enter into the contract, and give the troupe eighty per centum of the gross receipts of the houses, one-half of which went to Wachtel. Both the plaintiffs testified that it was Wachtel's popularity and capabilities as a singer upon which they relied to fill their theater and reimburse themselves for their expenses and make a profit. The appearance of Wachtel in the operas was the principal thing contracted for, and the presence of the others of the company was but incidental to the employment and appearance of the "famous German tenor." The place of any other member of the company could have been supplied, but not so of Wachtel. His presence was of the essence of the contract, and his part in the performances could not be performed by a deputy or any substitute. The plaintiffs would not have been bound to accept, and would not have accepted the services of the troupe under the contract without Wachtel; it would not have been the "Wachtel Opera Troupe" contracted for without him.

There is no dispute as to the facts. The only question is one of law, as to the effect of the sickness, and consequent inability of Wachtel to fulfill the engagement, upon the obligations of the defendants. So far as this question is concerned, it must be treated as if the contract was for the performance by Wachtel alone; as if he was the sole performer contracted for. This follows from the conceded fact that his presence was indispensable to the performance of the services agreed to be rendered by the entire company. In this view of the case, the legal question is very easy of solution, and can receive but one answer. The sickness and inability of Wachtel occurring without the fault of the defendants, constitutes a valid excuse for the non-performance of the contract. Contracts of this character, for the personal services, whether of the contracting party or of a third person, requiring skill, and which can only be performed by the particular individual named, are not, in their nature, of absolute obligation under all circumstances. Both parties must be supposed to contemplate the continuance of the ability of the person whose skilled services are the subject of the contract, as one of the conditions of the contract. Contracts for personal services are subject to this implied condition, that the person shall be able at the time appointed

to perform them; and if he dies, or without fault on the part of the covenantor becomes disabled, the obligation to perform is extinguished. This is so well settled by authority that it is unnecessary to do more than refer to a few of the authorities directly in point. People v. Manning, 8 Cow. 297; Jones v. Judd, 4 N. Y. 411; Clark v. Gilbert, 26 N. Y. 279; Wolfe v. Howes, 24 Barb. 174, 666; 20 N. Y. 197; Gray v. Murray, 3 Johns. Ch. R. 167; Robinson v. Davison, L. R. 6 Exchcq. 269; Boast v. Firth, 4 L. R. Com. Pleas, 1. The same principle was applied in Dexter v. Norton (47 N. Y. 62) and for the same reasons, to a contract for the delivery of a quantity of specified cotton destroyed by fire, without the fault of the vendor, intermediate the time of making the executory contract of sale and the time for the delivery.

The judgment must be affirmed. All concur, except Folger, J., absent.

Judgment affirmed.[1]

9 Cyc. 632-633 (96-99, 1); W. P. 545 (30).

[1] See also Lacy v. Getman, *ante* p. 547; Dickinson v. Calaban's Adm'rs, *ante*, p. 542.

Wilful abandonment of contract prevents recovery for benefits already conferred by party in default, and renders him liable to respond in damages for the breach.—Lawrence v. Miller, 86 N. Y. 131. *Contra:* Britton v. Turner, 6 N. H. 481. But where full performance by plaintiff is impossible he may recover for benefits conferred. Wolfe v. Howes, 20 N. Y. 197; Green v. Gilbert, 21 Wis. 395; Manhattan Life Ins. Co. v. Buck, 93 U. S. 24. For recovery for benefits conferred upon abandonment of illegal contract, see Bernard v. Taylor, *ante*, p. 451.

CHAPTER V.

Discharge of Contract by Operation of Law.

Merger.

CLIFTON *v.* JACKSON IRON CO.

74 MICHIGAN, 183.—1889.

Trespass. Defendant brings error.

Campbell, J. The plaintiff sued defendant for trespass in cutting his timber in the winter of 1885-6. The defense set up was that the timber, though on plaintiff's land, belonged to defendant. This claim was based on the fact that on September 22, 1877, a little more than eight years before the trespass, defendant made a contract to sell the land trespassed on to the plaintiff, but with this reservation:

"Reserving to itself, its assigns and corporate successors, the ownership of pine, butternut, hemlock, beech, maple, birch, iron-wood, or other timber suitable for sawing into lumber, or for making into fire-wood or charcoal, now on said tract of land, and also the right to cut and remove any or all of said timber, at its option, at any time within ten years from and after the date of these presents."

There were some unimportant provisions, also, not now material. Plaintiff showed that on November 4, 1885, the defendant conveyed to him the land in question by full warranty deed, and with no exceptions or reservations whatever. The testimony of defendant's agent, who cut the land, tended to prove that when the cutting was done the defendant's manager did not dispute plaintiff's title, but gave the agent to understand that it belonged to plaintiff, but that some arrangement would be made about it; that plaintiff was then absent, and there was no conversation with him or his wife on the subject. The bill of exceptions certifies that no other evidence was given concerning the right to cut timber. Upon these facts the court held that the deed conveyed the right in the timber to plaintiff, and that he owned it.

Had no deed been made, it is agreed that the reservation would have prevailed. But a previous contract cannot contradict or control the operation of a deed. It was competent for defendant to relinquish any contract reservation, and a deed which grants and warrants without any reservation has that effect. We do not hold that if the deed were so made by some mistake within the cognizance of equity the

mistake might not be corrected. Neither need we consider whether, after such a deed, there might not be such dealings as to render such timber-cutting lawful, by license, express or implied. In this case there was no testimony tending to show that the deed was not supposed and intended to close up all the rights of the parties.

The judgment must be affirmed.

9 Cyc. 633-635 (5-11); W. P. 874 (21).

Alteration or loss of a written instrument.

SMITH *v.* MACE.

44 NEW HAMPSHIRE, 553.—1863.

Assumpsit to recover a balance due on the sale of lands. Verdict for plaintiff.

Defendants gave plaintiff two notes for $300 and $400, which they alleged had been altered by inserting the word "annually" after the rate of interest. The court charged that if the word "annually" was wrongfully and fraudulently inserted, the notes would be void, but the debt would not be paid and the plaintiff might recover.

BELLOWS, J. The principal question in this case arises upon the instructions to the jury, that although the notes given for the price of the land would be rendered void by fraudulent alteration, yet the debt would still remain, and the plaintiff might recover upon the general count.

The ground taken by the plaintiff is, that the notes were not payment of the price, unless so agreed by the parties, and that upon the production of the notes at the trial, or proof of their loss or destruction, the plaintiff might recover upon the original consideration. Assuming that the notes were to be regarded strictly as collateral security, the position of the plaintiff might, perhaps, be tenable; but we think they are not to be so regarded, but rather as payment, upon condition that the notes are productive at maturity; and in the meantime suspending the vendor's right of action; therefore in case the notes of a third person are received for the price of the property sold, the vendor is bound to use due diligence to charge such third person, or his laches will operate to discharge the original contract; and the fact that no recovery can be had without producing or accounting for the note received, is inconsistent with the position that it is held in such cases strictly as collateral security. So also the discharge of the notes by a release would discharge also the original contract; and we think that the same effect would be produced by such a fraudulent alteration of the notes by the vendor as would render them void.

In the case of such an alteration the policy of the law makes the

note wholly void, upon the ground stated in Master v. Miller (4 D. & E. 345), that "a man shall not take the chance of committing a fraud, and, when the fraud is detected, recover on the instrument as originally made." This sound and salutary principle, based as it is upon high moral considerations, and long and well established in both the English and American courts, would be rendered entirely inert in respect to the original promisee, if, when detected in the fraudulent alteration of the written promise, he might recover, upon a promise implied by law, the amount of the original obligation. It would in fact be changed into a mere technical objection to the form of the action, which is utterly inconsistent with the policy which dictated it.

These views are fully sustained by the well considered case of Martendale v. Follet (1 N. H. 95), which is often cited, and, so far as we have observed, never questioned. The same doctrine is fully recognized in Wheelock v. Freeman, 13 Pick. 165. In both these cases notes were given for the price of property sold, and payable, the former in merchantable neat stock, and the latter in stock in one year, or money in two. In both the alterations affected the mode of payment, and in both it was decided that no recovery could be had upon the original consideration.

In Arrison v. Harmstead (2 Penn. St. 191) there was a deed of land, reserving rent, and after the delivery, it being in the hands of the scrivener, it was altered by the grantor; held, in an action for the rent, with counts for use and occupation, etc., that the plaintiff could not recover, either on the deed or for use and occupation; for, although the land passed by the deed, the estate of the grantor was destroyed, as a penalty for the fraud in making the alteration. The case is well considered, and the court say: "If a bond, note, or other instrument for the payment of money be altered, and thereby avoided by the obligor, it has never been suffered, or even attempted to recover on the original contract; as, for example, for money lent. It is a mistake to suppose the evidence of title only is avoided. The whole contract becomes void, and it is held, as a principle of policy, that the fraudulent party may lose, but can gain nothing by his fraud." See also Miller v. Gilleland, 19 Penn. St. 119.

In White v. Hass (32 Ala. 430) it is laid down that although a promissory note, not under seal, may not be a merger of the contract for which it was given, yet the payee cannot recover on the original consideration, when his recovery on the note is defeated by proof of material alteration by him, without the assent of the maker, which renders the note void. The court say, "as the note was at first valid, there can be no recovery on the contract unless the note still continues valid, and is produced in evidence, or proved to have been lost by time or accident; and to allow the payee, after he had designedly made a material alteration in the note, without the assent of the

maker, to recover upon the contract for which the note was given, would be to depart from the sound and just principle that no one shall be permitted to take the chance of committing a fraud without running any risk by the event, when it is detected."

In Whitmer v. Frye (10 Mo. 348) it was held, that where a party by his own act alters an instrument, so that it cannot be the foundation of any legal remedy, he will not be permitted to prove the covenant, or promise contained in it, by any other evidence; and that this principle will prevent a resort to the common counts in order to sustain the plaintiff's right of recovery. This case is cited by counsel in White v. Hass (32 Ala. 430) and was a case of a sealed instrument, but no stress was put upon that. See also 1 Greenl. Ev., § 568, and note 4; Newell v. Mayberry, 3 Leigh, 250; Mills v. Starr, 2 Bailey, 359, cited in 2 Smith's L. C. (5th Am. ed.) 961.

So it is held that where a note, given at the time when the liability occurs, is usurious, and therefore void by the New York law, no recovery can be had upon a general count for the sum justly due, for the whole transaction is infected; and yet the money justly due is good consideration for a subsequent express promise; but the law will raise no promise by implication. Rice v. Welling, 5 Wend. 595; Early v. Mahon, 19 Johns. 147; Hammond v. Hopping, 13 Wend. 505.

In Blade v. Noland (12 Wend. 173) the suit was upon a note, destroyed or lost, and for the work and labor of which the note was given; and it was held that proof that the note was voluntarily and deliberately burnt will not authorize the secondary proof of its contents, or entitle the plaintiff to resort to the original consideration. Clute v. Small (17 Wend. 238) takes a distinction between an innocent alteration, though unauthorized, and a fraudulent alteration. The court, Cowen, J., says: "To allow a holder the privilege of destroying his note and thus bringing himself to the original consideration, would put it in his power to acquire an advantage by a wrongful suppression of testimony;" and he says of Atkinson v. Haydon (2 Ad. & El. 628) that the question arose upon pleading, and for aught that appeared the alteration was made under an honest mistake of right, and he says perhaps this distinction should be adopted.

To the point that although, technically speaking, such a note is not regarded as an extinguishment of an antecedent debt, yet is treated as payment *sub modo;* or a payment on condition that the note prove to be productive, are the cases of Angel v. Felton, 8 Johns. 149; Burdick v. Green, 15 Johns. 247; Ward v. Evans, 2 Ld. Raym. 928.

To entitle the vendor, then, to maintain a suit on the original promise, or for money had and received, the note must be produced and cancelled at the trial, or otherwise accounted for; and regularly

it should appear that the note, when so produced, still continues valid, and not discharged or avoided. Such is the doctrine distinctly of Martendale v. Follet, and also of White v. Hass, 32 Ala. 430. If fraudulently altered by the vendor its identity is destroyed, and he shall not be permitted to explain it by showing his own turpitude. The vendor therefore has lost the power to produce the note; and by his own fraudulent act designed to injure the vendee or debtor; and he cannot, consistently with sound public policy, be permitted to recover on the original consideration, and thus, by merely changing the form of action, avoid the consequences of his crime. The rule which seeks to punish the offender by destroying the claim which is thus tampered with, has no such formal or technical foundation, but stands upon the broad foundations of public policy, which treats such an act as a virtual discharge of the debt, as much as if it had been released.

We are aware that it is laid down (in Chit. on Bills, 184), that in such cases the party may resort to the original promise, although it is said (on page 598) that where a party is discharged by the alteration of the bill, or the laches of the holder, the plaintiff cannot resort to the general counts.

The authority upon which Mr. Chitty relies for the position that he cannot resort to the general counts is Atkinson v. Haydon, 2 Ad. & El. 628; but it appears upon examination that a fraudulent alteration was not alleged in the pleading; furnishing ground for the distinction suggested by Cowen, J., in Clute v. Small (17 Wend. 238), before adverted to. The decision, moreover, was simply announced by the court, and no reasons for it assigned. On the other hand, in Powell v. Divett (15 East, 29), it was held that a material alteration in a sale note avoids it, and that no action could be maintained on the contract evidenced by it.

Reference has also been made to the case of alterations of bills and notes without a new stamp, but it will be seen at once that this class of cases is not in point, inasmuch as the alteration is not fraudulent; but, although made with the consent of both parties, is rendered void by positive statute.

The other exceptions are all overruled, but, for errors in the instructions adverted to, there must be

A new trial.

2 Cyc. 183 (8, 10, 11); 185 (17); 9 Cyc. 635 (12); Williston, Discharge of contract by alteration, 18 H. L. R. 105, 165.

CLOUGH *v.* SEAY *et al.*

49 IOWA, 111.—1878.

Action on promissory note, and for foreclosure of a mortgage. Defense, alteration, by cutting off from the bottom the words "we will pay fifteen per cent interest in addition to the interest mentioned in the above note."

DAY, J. . . . Appellants insist that the alteration of the note was fraudulent, and that, therefore, the plaintiff should not be permitted to recover upon the original consideration. The answer does not allege, nor does the court find, that the alteration was fraudulent. We have no statement that the abstract contains all the evidence, and hence we cannot review the findings of the court upon the facts. If, however, the abstract contains all the evidence, and the case were in condition to be tried *de novo*, we should feel impelled to find that the fact of alteration is not established by a preponderance of evidence. We are bound by the finding of the court that there was a material alteration but we cannot go beyond that finding, and find the further fact that the alteration was fraudulent.

Appellants seem to insist, however, that the note embraces the contract of the parties, and supplies the place of any implied promise arising out of the borrowing of the money, and that the alteration of the note, however innocently made, deprives the plaintiff of any right to recover upon the original consideration. We believe the better doctrine to be opposed to this view. In Krause v. Meyer (32 Iowa, 569) both parties conceded that if the alteration was innocently made the plaintiff might recover upon the consideration of the note. Because of this concession the point was not determined in that case. In Vogle *et al.* v. Ripper (34 Illinois, 100), which was an action to foreclose a mortgage executed to secure notes which had been altered so as to draw ten instead of six per cent, the following language is employed: "In a court of equity a mortgage is regarded as an incident of the debt, and, where a mortgagee has released or discharged the debt by a fraudulent alteration or destruction of the written evidence of it, he ought not to be permitted to sustain a suit for its recovery; but where the alteration was not fraudulent, although the identity of the instrument may be destroyed, we think it should not cancel the debt, of which the instrument was merely the evidence. If there was no attempt to defraud, there is no reason why a court should not assist the creditor so far as it can consistently." In this case there was a decree for the sum due, and foreclosure of the mortgage. See also Matteson v. Ellsworth, 33 Wis. 488. In Parsons on Notes and Bills, Vol. 2, p. 572, respecting alterations of notes innocently made, it is said: "And

though it is true that an avoided noted destroyed innocently by a material alteration cannot even be the evidence of the original debt, it does not destroy the debt. The debt is still obligatory, and may be recovered by a suit on the original cause of action." The case of Wheelock v. Freeman (13 Pickering, 165), upon which appellants rely, was decided upon the ground that the alteration was fraudulent.

It is claimed that the court erred in decreeing the foreclosure of the mortgage, the note, which it was executed to secure, having been rendered void by a material alteration. We think this action of the court was right. See Vogle v. Ripper, 34 Illinois, 100; Sloan v. Rice, 41 Iowa, 465. . . .

Affirmed.[1]

2 Cyc. 183 (8-11); 224 (33); W. P. 870 (4).

McRAVEN *v.* CRISLER.

53 MISSISSIPPI, 542.—1876.

[Reported herein at p. 664.]

BLADE *v.* NOLAND.

12 WENDELL (N. Y.), 173.—1834.

Error from the Jefferson common pleas.

Noland sued Blade in a justice's court, and declared on a note destroyed or lost, and for work and labor. The defendant pleaded the general issue and gave notice of set-off. The plaintiff called a witness, and proved by him that the defendant previous to 4th March, 1832, gave the plaintiff a note for $24.80, payable in three months, for wages due to him for work done for the defendant. The plaintiff himself was then sworn, to prove the loss of the note, and testified that he burnt it up the next morning after it was given. A witness called by the defendant also gave testimony tending to show that the note was burnt by the plaintiff on the day after it was given. There however was proof that the note was in existence subsequent to the day on which the plaintiff alleged it was destroyed. There was also evidence of payments by the defendant on account. The justice rendered judgment in favor of the plaintiff for $18, besides costs. The common pleas of Jefferson, on *certiorari*, affirmed the judgment of the justice. The defendant sued out a writ of error.

NELSON, J. I concede the rule insisted on by the counsel for the

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1 Alteration by stranger does not invalidate instrument. Bigelow v. Stilphens, 35 Vt. 521.

plaintiff below, to the fullest extent, borne out by the authorities, and they are numerous; and still am of opinion that the plaintiff did not give such proof of the *loss of the note* as to justify the secondary proof of its contents, or to entitle him to resort to the original consideration. If there had been satisfactory proof of the loss or destruction of the note, the omission to give a bond of indemnity under the statute (2 R. S. 406, §§ 75, 76) would not have interfered with the recovery; for the provision of the statute on this subject is limited to *negotiable paper*. There is no evidence that the note in question was negotiable, and it seems to be settled that the court will not *presume* a lost note to be negotiable. 10 Johns. R. 104; 3 Wendell, 344.

The proof is, that the plaintiff deliberately and voluntarily destroyed the note before it fell due, and there is nothing in the case accounting for, or affording any explanation of the act, consistent with an honest or justifiable purpose. Such explanation the plaintiff was bound to give affirmatively, for it would be in violation of all the principles upon which inferior and secondary evidence is tolerated, to allow a party the benefit of it who has wilfully destroyed the higher and better testimony. The danger of this very abuse of a relaxation of the general rule greatly retarded its introduction into the law of evidence, and it was for a long time confined to a few extreme cases, such as burning of houses, robbing, or some unavoidable accident. It was contended by Chancellor Lansing, in the case of Livingston v. Rogers (2 Johns. Cas. 488), after an examination of all the leading cases on the subject, that secondary evidence was not admissible to prove the contents of a paper, where the original had been lost by the *negligence* or *laches* of the party or his attorney. He failed to convince the court of errors to adopt his views in a case where the negligence was not so great as to create suspicion of design. Further than this I could not consent to extend the rule. I have examined all the cases decided in this court, where this evidence has been admitted, and in all of them the original deed or writing was lost, or destroyed by time, mistake, or accident, or was in the hands of the adverse party. Where there was evidence of the actual destruction of it, the act was shown to have taken place under circumstances that repelled all inference of a fraudulent design. 2 Johns. Cas. 488; 2 Caines, 363; 10 Johns. R. 374, 363; 11 Id. 446; 8 Id. 149; 3 Cowen, 303; 8 Id. 77; 3 Wendell, 344; Peak's Ev. 972 (Am. ed.); 10 Co. 88, Leyfield's case; 3 T. R. 151; 8 East, 288, 9; Gilb. Ev. 97.

In Leyfield's case Lord Coke gives the obvious reasons why the deed or instrument in writing should be produced in court: 1. To enable the court to give a right construction to it from the words; 2. To see that there are no material erasures or interlineations; 3. That any condition, limitation, or power of revocation may be seen; for these reasons oyer is required in pleading a deed. But he says, in great and

notorious extremities, as by casualty of fire, etc., if it shall appear to the judges that the paper is burnt, it may be proved by witnesses so as not to add affliction to affliction.

The above is in brief the foundation of the rule in these cases of secondary proof of instruments in writing, and it has been much relaxed and extended in modern times from necessity, and to prevent a failure of justice; yet I believe no case is to be found where, if a party has deliberately destroyed the higher evidence, without explanation showing affirmatively that the act was done with pure motives, and repelling every suspicion of a fraudulent design, that he has had the benefit of it. To extend it to such a case would be to lose sight of all the reasons upon which the rule is founded, and to establish a dangerous precedent. We know of no honest purpose for which a party, without any mistake or misapprehension, would deliberately destroy the evidence of an existing debt; and we will not presume one.

From the necessity and hardship of the case, courts have allowed the party to be a competent witness to prove the loss or destruction of papers; but it would be an unreasonable indulgence, and a violence of the just maxim that no one shall take advantage of his own wrong, to permit this testimony where he has designedly destroyed it.

Judgment reversed.

17 Cyc. 525–526 (7–9); W. P. 844 (53).

Discharge by bankruptcy.

REED *v.* PIERCE.

36 MAINE, 455.—1853.

Action on covenants broken. Defense, discharge in bankruptcy.

In 1833 defendant mortgaged land to A., and in 1835 conveyed the land to plaintiff with covenants that it was free from incumbrances and that he would warrant and defend it against all lawful claims. In 1851 the mortgagee entered and took possession, to regain which plaintiff paid $1169.86 in discharge of the mortgage. Defendant introduced as a bar to the suit his discharge in bankruptcy dated in 1842, and the schedule of debts showing the amount then due on the mortgage to A.

APPLETON, J. The defendant conveyed to the plaintiff by deed of warranty, premises, which at the time were subject to mortgage, and has since received his discharge in bankruptcy. At the time of his application and discharge, the notes secured by mortgage were outstanding and no entry had been made by the mortgagee for the purpose of foreclosure. Subsequently the mortgage was foreclosed and the plaintiff was evicted by the paramount title of the mortgagee.

This suit is brought on the several covenants of the defendant's deed, in bar to the maintenance of which the defendant has pleaded his discharge.

The covenant against incumbrances was broken at the time of the conveyance. The damages to which the plaintiff was entitled were readily ascertainable. If he had paid the mortgage notes, the sum paid would have been the measure of damages. If the incumbrances had not been removed and there had been no action on the part of the mortgagee to enforce his mortgage, the plaintiff's damages would have been nominal. To this covenant, as it was broken before the defendant's bankruptcy, and as the plaintiff might have proved his claim for its breach, the discharge is a bar.

The several covenants in a deed of warranty are distinct; their breach arises at different times; is established by proof of different facts, and damages thereof may be enforced by different suits and recompensed by different rules of assessment. It is obvious then that what may be a discharge of one is not necessarily that of another and distinct covenant.

The breach of the other covenants was long after the discharge in bankruptcy. So far as the claims now in suit could have been proved and the plaintiff have received his dividends upon their proof, the discharge is a bar, and no farther.

The defendant, to show that they might have been proved, relies on the sixth section of the Bankrupt Act, by which persons having uncertain and contingent demands are permitted to come in and prove such debts or claims.

The meaning of the phrase "contingent demand," and the corresponding expression in the English bankrupt law, "debt payable upon a contingency," has been definitely settled by repeated adjudications in this and in other States, as well as by the English courts. In Woodard v. Herbert (24 Maine, 360) the distinction between a contingent demand and a contingency whether there ever would be a demand, was recognized and adopted. "The contingent or uncertain demands provided for," says Shepley, J., "in the act of Congress, are the contingent demands, which were in existence as such, and in a condition that their value could be estimated at the time when the party was decreed a bankrupt." The same construction was reaffirmed in Ellis v. Ham, 28 Maine, 385, and in Dole v. Warren, 32 Maine, 94. In Goss v. Gibson (8 Humph. 199) it was held that a discharge in bankruptcy would not relieve one surety from the claim of another surety who had paid money for the principal after the decree. "At the time these defendants were declared bankrupts," says Green, J., "the complainant had no debt or demand against them. The complainant had no demand that could be proved at the time the defendants were declared bankrupts. The possibility of the demand

that now exists was incapable of valuation." It was decided in Cake v. Lewis (8 Barr. 493) that the liability of a principal to his guarantee was not discharged by bankruptcy. In Boorman v. Nash (9 B. & C. 145) the defendant, who had contracted for a certain quantity of oil to be delivered to him at a future day at a certain price, became bankrupt before the day arrived and obtained his certificate. "The right of the plaintiff," says Lord Tenterden, "to maintain this action, depends upon the question whether he could or could not have proved his demand under the commission of bankrupt issued against the defendant. It appears to us impossible that he should so prove it; for at the time when the commission issued, it was uncertain not only what amount of damage, but whether any damage would be sustained." A similar decision was made in Woolley v. Smith, 54 E. C. L. 610.

In Thompson v. Thompson (2 Scott, 266) it was decided that the instalments of an annuity, for the payment of which a surety expressly covenanted in default of the grantor, are not provable under a *fiat* against the surety, when such instalments do not become due until after the bankruptcy of the surety. "Before the days of payment arrive," said Tindal, C. J., in delivering his opinion, "these instalments are not only no debt, but can never become a debt from the surety, except in the event that the grantor of the annuity shall make default in such payments. The value of such a contingency it is impossible to calculate." *Ex parte* Davies, 1 Dea. 115; Toppin v. Field, 4 Ad. & El. N. S. 387; Hinton v. Acraman, 2 Man., Gran. & Scott, 369.

In the South Staffordshire Railway Co. v. Burnside (2 Eng. Law and Eq. 418) the holder of shares in a corporation, who became bankrupt, and received his certificate, was held not to be discharged from his liability for subsequent calls.

In Hankin v. Bennett (14 Eng. Law and Eq. 403) the defendant executed a bond, whereby he became liable as surety to pay the plaintiff such costs as the plaintiff should in due course of law be liable to pay in case a verdict should pass for certain defendants in an action of *scire facias,* in which the now plaintiff sued as a nominal party. "We think, however," says Martin, B., "this liability was not a debt at all within the meaning of the section. It was a contract to indemnify a nominal plaintiff whose name was used by a third person, against such costs as the plaintiff would become liable to pay if the defendants should obtain judgment in their favor. It seems to us impossible to consider that this is a debt. It is a contingent liability, but not a contingent debt."

The plaintiff could not have proved any claim for breach of the covenant, that the defendant would warrant and defend the premises against the lawful claims and demands of all persons, for it had not been broken. Whether there were any such claims and demands out-

standing, and whether they embraced the whole or a part of the premises conveyed, was uncertain. If any such existed, their enforcement was dependent on the will of those having such claims. The plaintiff could not have presented any present claim or existing demand. The possibility that one might arise is not enough. In all sales of personal property the title of the vendee may be defeated by adverse and superior rights. In such sales there may be a breach of the implied warranty of title by subsequent eviction. The vendee of real or personal property, in the undisturbed enjoyment of his purchase and without any breach of the covenants, express or implied, of his vendor, can hardly be considered as having a contingent claim, because of the possibility that some unknown claimant may at some indefinitely remote period of time interpose a superior title, by means of which he may be deprived of the property purchased. If the unbroken covenants of a deed, or the possible breach of the implied warranty of title in sales of personal property, were to be deemed claims within the statute, then every grantee or vendee might present his claim before the commissioner, and the estate of the bankrupt would remain unadjusted till all possibility of a breach should be barred by the statute of limitations, for it could not before such time be known that they might not arise. Such a position would be entirely at variance with the provision of section 10, which requires that all proceedings in bankruptcy shall be brought to a close within two years after the decree declaring the bankruptcy, if practicable, for it would lead to an indefinite postponement of the settlement of estates. It was adjudged in Bennett v. Bartlett (6 Cush. 225), in relation to personal property, that a discharge in bankruptcy was no bar to the creditor's right of action against the debtor, on the implied warranty of title, when the breach occurred after such discharge. The reasoning of the court in that case is equally applicable to the case at bar.

The result is, that the discharge affords no defense, except as to the covenant against incumbrances, which alone could have been proved.

Defendant defaulted.

5 Cyc. 398 (37–38).

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